TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 249.

EDWIN WALKER, PLAINTIFF IN ERROR,

vs.

WILLARD JOHNSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 18, 1875.

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No. 249.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Wednesday, the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and seventy-five, in the December term in the year of our Lord one thousand eight hundred and seventy-four of said court, and of our independence the ninety-ninth year.

WILLIAM H. BRADLEY,
Clerk.

WILLARD JOHNSON
vs.
EDWIN WALKER. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the 27th day of September, A. D. 1872, came the said plaintiff, Willard Johnson, by Messr's Williams and Thompson, his attorneys, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in the
2 district aforesaid, his praecipe for a writ of summons against said defendant, and at the same time filed his bond for costs in said entitled cause, which said praecipe and bond for costs are respectively in the words and figures following, to wit:

Praecipe.

STATE OF ILLINOIS:

Circuit court of the United States, northern district of Illinois, ss:

Circuit court of the United States to October term, A. D. 1872.

WILLARD JOHNSON, OF THE STATE OF NEW York, plaintiff,
vs.
EDWIN WALKER, OF THE STATE OF ILLINOIS, defendant. } Ass't.

The clerk of said court will issue a summons in the above cause, directed to the marshal of said district, in plea of trespass on the case on promises, returnable at the October term of said court, A. D. 1872, to the damage of the plaintiff of twenty thousand dollars.

Sept. 27, 1872.

WILLIAMS & THOMPSON,
Plaintiff's Attorney.

To W'm H. BRADLEY, Esq., *Clerk.*

(Endorsed:) Filed this 27th day of Sept., 1872. W'm H. Bradley, clerk.

3 *Bond for costs.*

NORTHERN DISTRICT OF ILLINOIS:

Circuit court of the United States.

WILLARD JOHNSON, OF THE STATE OF NEW York,
vs.
EDWIN WALKER.

I do hereby enter myself security for costs in this cause, and acknowl-

edge myself bound to pay or cause to be paid all costs wh
in this action, either to the opposite party or to any of t
this court, in pursuance of the laws of this State.

Dated this 27 day of September, A. D. 1872.

WILLIAMS & THOM

(Endorsed:) Filed this 27th day of Sept., A. D. 1872. W'm I
ley, clerk.

Writ of summons.

And on the same day, to wit, the 27th day of September, A. D. 1872 a writ of summons issued out of said clerk's office against said defendant, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

4 We command you to summon Edwin Walker, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Willard Johnson of a plea of trespass on the case upon promises, to his damage, as he alleges, of twenty thousand dollars; and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 27th day of September, in the year of our Lord one thousand eight hundred and seventy-two, and of our independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

I served the within summons by reading the same to and in the presence and hearing of Edwin Walker, therein named, on the 27th day of September, 1872.

B. H. CAMPBELL,
U. S. Marshall,
By S. H. TOURTELLOTTE,
Deputy.

(Endorsed:) Filed Oct. 7th, A. D. 1872. W'm H. Bradley, clerk.

5 *Declaration.*

And afterwards, to wit, on the 6th day of December, A. D. 1872, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
State of Illinois, northern district of Illinois, ss:

In the circuit court of United States, northern district of Illinois, of the October term, A. D. 1872.

Willard Johnson, a citizen and resident of the State of New York,

plaintiff in this suit, by Williams & Thompson, his attorneys, complains of Edwin Walker, a resident and citizen of the State of Illinois, defendant in this suit, who has been duly summoned to answer the plaintiff of a plea of trespass on the case on promises. For that whereas the said defendant heretofore, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-two, at said district, became and was indebted to the said plaintiff in the sum of twenty thousand dollars of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the defendant, and at the special instance and request of said defendant, and being so indebted to the said plaintiff, the said defendant in consideration thereof afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

6

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandise of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last-aforesaid goods, wares, and merchandise, at the time of sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested. And the said plaintiff avers that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of twenty thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, on the same day and year, and at the place aforesaid, had notice.

7

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in the further sum of twenty thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant; and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and in the like sum for other money by the said defendant before that time had and received to and for the use of said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and in the like sum for the price and value of work then done and material for the same provided by the plaintiff for the defendant, and at the like special request of the defendant; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same

day and year and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further sum of twenty thousand dollars of the like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff, and the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, etc.) hath not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto altogether refused and still doth refuse, to the damage of the said plaintiff twenty thousand dollars, and therefore the said plaintiff brings suit, etc.

WILLIAMS & THOMPSON.
Plaintiff's Attorney.

Copy of the account sued on.

Edwin Walker to Willard Johnson, Dr.

To money lent and advanced	$20,000 00
To money paid, laid out and expended	20,000 00
To money had and received to and for the use of said plaintiff	20,000 00
To goods, wares and merchandise sold and delivered	20,000 00
To labor, services and material	20,000 00
To balance due on account stated	20,000 00

(Endorsed:) Filed this 6th day of Dec., A. D. 1872. W'm H. Bradley, clerk.

Plea.

Afterwards, to wit, on the 11th day of March, A. D. 1873, said defendant, by his attorneys, filed in said clerk's office his plea in said entitled cause; which said plea is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In circuit court of said district, to March term, A. D. 1873.

WILLARD JOHNSON
v.
EDWIN WALKER. } Assumpsit.

And now comes the said defendant, by Fuller & Smith, his attorneys, when, &c., and defends the wrong and injury, and for plea says that he never promised in manner & form as the said plaintiff has thereof in his said declaration declared and alleged against him, and of this he puts himself upon the country, &c.

By FULLER & SMITH,
His Att'ys.

(Endorsed:) Filed March 11, 1873. W'm H. Bradley, clerk.

Afterwards, to wit, on the 5th day of January, A. D. 1874, in the December term, A. D. 1873, of said court, in the record of the proceedings thereof in said-entitled cause is the following entry, to wit:

WILLARD JOHNSON } Assumpsit.
vs.
EDWIN WALKER. }

On motion of the plaintiff, by his attorney, and with the consent of the defendant's attorney, leave is given him to file an amended declaration herein.

Additional counts to declaration.

And on the same day, to wit, the 5th day of January, A. D. 1874, said plaintiff, by his attorneys, filed in said clerk's office additional counts to said declaration; which said counts are in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of United States, of the October term, A. D. 1873.

WILLARD JOHNSON }
vs.
EDWIN WALKER. }

ADDITIONAL COUNTS.

11 And also for that whereas heretofore, to wit, on the sixth day of November, A. D. 1869, at Chicago, to wit, at said district, the plaintiff entered upon the performance of a certain contract and agreement, then existing between the canal commissioners of the State of Illinois and the plaintiff, for building and constructing a dam and lock near Henry, in said State, for the improvement of the Illinois River, said dam and lock to be built and constructed in great part of stone.

That the defendant, to wit, at the time and place aforesaid, entered into a contract and agreement with the plaintiff, in and by which the said defendant promised and agreed with the plaintiff to furnish to the plaintiff all the stone which should be required for the construction of said dam and lock, said stone to be delivered to the plaintiff on board of canal boats at Henry aforesaid, as the same should be required in the progress of said work of building and constructing said dam and lock, said stone to be of the form, description, and dimensions required for said work; the quantity of the several kinds of stone which the said defendant should deliver to the plaintiff to be after said delivery ascertained from the estimates, to be made from time to time by the engineer in charge of the construction of said dam and lock.

12 And the plaintiff avers that in consideration of the said promise and agreement, he, the plaintiff, promised and agreed, to and with the defendant, to pay to the said defendant, and the defendant then and there agreed to receive from the plaintiff, for all of said stone required to build and construct said dam and lock, as follows: For all canal-bank stone, one dollar and forty cents per cubic yard; for

all vertical or battered wall or heavy rubble-stone, furnished from defendant's quarry, three dollars and thirty-eight cents per cubic yard; for all block and dimension stone, seven dollars and forty-five cents per cubic yard; on, to wit, the day aforesaid, at, to wit, the county aforesaid.

And the plaintiff avers that said varieties of stone were all the kinds of stone required to build and construct said dam and lock, and that, to wit, two hundred thousand cubic yards of each of said several kinds of stone were required to build and construct said dam and lock.

And the said plaintiff, relying upon the said promise and agreement of the said defendant, entered upon the business of building and constructing said dam and lock, and as stone were required on said work of building and constructing said dam and lock, and upon, to wit, the first day of July, A. D. 1870, at, to wit, the district aforesaid, and divers other times during said year, notified the said defendant that stone were required and needed in said working of building and constructing said dam and lock; and also at said time and times
13 specified the kind & quantity of stone so required and then and there demanded of the said defendant the delivery of said stone at Henry aforesaid, in accordance with the terms of said contract and agreement.

And the plaintiff avers that the said defendant, not regarding his said promise and agreement, neglected and refused to deliver said stone so required as aforesaid to the plaintiff at Henry aforesaid, and the plaintiff avers that he was then and there willing and ready to receive and to pay for said stone in accordance with the terms of said contract and agreement, whereby the plaintiff was greatly damaged and put to great costs and inconvenience in procuring other stone to build and construct said dam and lock, and was obliged to pay for said last-mentioned stone, to wit, ten thousand dollars more than he would have been obliged to pay to the said defendant for the stone s) agreed to be furnished by the defendant at, to wit, the district aforesaid; and whereby, also, the said plaintiff was obliged to pay for cutting said stone so procured in place of the stone of the defendant, to wit, ten thousand dollars more than he would have been obliged to pay for cutting the said stone so agreed to be furnished to the plaintiff by the defendant.

And for that heretofore, to wit, on the first day of January, A. D. 1870, at, to wit, the northern district aforesaid, the plaintiff being engaged in building and constructing a dam and lock near Henry, in the
14 county of Marshall and State of Illinois, for the improvement of the Illinois River, said dam and lock to be built and constructed in great part of stone, at the special instance and request of the said defendant, bargained with the defendant to buy of the defendant, and the defendant then and there contracted and agreed with the plaintiff to furnish and deliver to the plaintiff, all the stone which should be required to build and construct said dam and lock to be delivered to the plaintiff (on board of canal-boats)* at Henry aforesaid, from time to time, and as the same should be required in said work of building said dam and lock; and in consideration thereof the plaintiff then and there promised and agreed to pay to the defendant for said stone, after the delivery thereof, as follows: for all canal-bank stone, one dollar and forty cents per cubic yard; for all vertical or battered wall or heavy rubble-stone furnished from defendant's quarry, three dollars and thirty-eight cents per cubic yard; for all block and dimension stone, seven dollars and forty-five cents per cubic yard; the quantity of the said sev-

* Words inclosed in parentheses underscored in red ink.

eral kinds of stone which the said defendant should deliver to be, after the delivery thereof, ascertained from estimates made from time to time by the engineer in charge of the construction of said dam and lock; and in consideration thereof, and that the plaintiff then and there promised to receive said stone and to pay the defendant for the same as
15 aforesaid on, to wit, the day and year aforesaid, at, to wit, the district aforesaid, the defendant then and there promised the plaintiff to deliver said stone to the plaintiff as aforesaid.

And the plaintiff avers that afterwards, to wit, on the day and year aforesaid, at, to wit, the district aforesaid, the defendant entered upon the execution and performance of said contract and agreement, and did then and there deliver to the plaintiff at Henry aforesaid (on board of canal-boats)*, as aforesaid, a portion of said stone so contracted to be delivered, to wit, fifty cubic yards thereof; and the plaintiff avers that afterward stone were required in the construction of said dam and lock, and that the plaintiff did, at said last-mentioned time, on, to wit, the first day of August, A. D. 1870, notify the defendant that stone were required in said work, and did then and there notify the defendant of the kind and kinds of stone so required in said work, and then and there requested the defendant to deliver the same according to the terms of said agreement; and although the plaintiff was ready and willing to receive said stone and to pay for the same according to the terms of said agreement, yet the defendant did not, nor would at said time, or at any other time, deliver said stone to the plaintiff as aforesaid, or any part thereof, except the said fifty cubic yards so delivered as aforesaid, which were only, to wit, one hundredth part of the said stone required in said work and by the plaintiff demanded of the defendant as aforesaid,
16 whereby the plaintiff was obliged to procure, and did procure, other stone for the purpose of building and constructing said dam and lock, and was obliged to and did pay for the same, to wit, ten thousand dollars more than he would have been obliged to pay to the defendant for the said stone so contracted and agreed to be delivered to the plaintiff by the defendant, to wit, at the district aforesaid; also, whereby the plaintiff was obliged to and did pay for cutting such portions of said stone as needed cutting and fitting for use in said work, to wit, ten thousand dollars more than he would have been obliged to pay for cutting the said stone so contracted to be delivered to the plaintiff by the defendant.

And for that whereas heretofore, to wit, on the sixth day of November, A. D. 1869, at Chicago, to wit, at the district aforesaid, the plaintiff being engaged in building and constructing a dam and lock in the Illinois River, near the city of Henry, for the improvement of said river, under a contract with the canal commissioners of said State of Illinois, said dam and lock to be built in great part of stone, at the request of the said defendant bargained for and agreed to buy of the said defendant all the stone required to build and construct said dam and lock; said stone to be of form, description, and dimensions required for said work, and to be delivered by the defendant to the plaintiff at
17 Henry aforesaid on board of canal-boats, as the same should be required in the work of building and constructing said dam and lock and during the season of A. D. 1870.

And the plaintiff avers that, to wit, five hundred thousand cubic yards of stone were required to build and construct said dam and lock; and in consideration thereof the plaintiff then and there promised and agreed

* Words inclosed in parentheses underscored in red ink.

to pay to the defendant for said stone, and after the delivery of the same, as follows: for all canal-bank stone, one dollar and forty cents per cubic yard; for all vertical or battered wall or heavy rubble stone furnished from defendant's quarry, three dollars and thirty-eight cents per cubic yard; for all block and dimension stone, seven dollars and forty-five cents per cubic yard, which said several kinds of stone embraced all the varieties of stone required for said work of building and constructing said dam and lock; and in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the said defendant to accept and receive the said stone from the defendant and to pay the said defendant therefor at the rates aforesaid, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to deliver the said stone to the plaintiff at Henry aforesaid as aforesaid, on, to wit, the day and year aforesaid, at, to wit, at the district
18 aforesaid.

And the plaintiff avers that afterward and on, to wit, the first day of August, A. D. 1873, at, to wit, the district aforesaid, stone were required in the said work of building and constructing said dam and lock; that, to wit, two hundred thousand cubic yards of canal-bank stone, and, to wit, one hundred thousand cubic yards of vertical wall and heavy rubble stone, and, to wit, one hundred thousand cubic yards of block and dimension stone were then and there so required in said work of building said lock and dam.

And the plaintiff avers that on, to wit, the day and year last aforesaid at, to wit, the district aforesaid, he notified said defendant that said stone were required in building and constructing said dam and lock, and then and there requested the defendant to deliver the same according to the terms of said agreement, and then and there demanded of the defendant that he should deliver said stone at Henry aforesaid on canal-boats as aforesaid. And the plaintiff avers that he was then and there ready and willing to pay for the same according to the terms of said agreement, to wit, at the district aforesaid, whereof the said defendant then and there had notice, yet the said defendant, not regarding his said promise and undertaking, did not, nor would at said time or at any time since, deliver said stone to the plaintiff, but, on the
19 contrary thereof, the said defendant wholly refused and still refuses so to do. By means whereof the plaintiff was obliged to and did procure other stone for the purpose of building and constructing said lock and dam, and was obliged to and did pay for the same, to wit, ten thousand dollars more for said stone than he would have been obliged to for the said stone of the defendant, and was obliged to and did pay for fitting the same ready for use and for cutting the same, to wit, ten thousand dollars more than he would have been obliged to pay for fitting the said stone of the defendant for use and for cutting the same, to wit, at the district aforesaid.

And whereas also heretofore to wit, on, to wit, the first day of February, A. D. 1870, at, to wit, the district aforesaid, in consideration that the said plaintiff at the like special instance and request of the said defendant, had then and there contracted and agreed with the said defendant to buy and purchase of and from the said defendant a certain quantity of stone, to wit, all the stone required to build and construct a certain dam and lock then being built and constructed by the plaintiff in the Illinois River, near Henry, in said State of Illinois, under a contract with the canal commissioners of said State, and to pay the said defendant for said stone as follows, to wit, for all canal-bank stone, one

dollar and forty cents per cubic yard; for all vertical, or battered
20 wall, or heavy rubble stone, furnished from defendant's quarry, three dollars and thirty-eight cents per cubic yard; for all block and dimension stone, seven dollars and forty-five cents per cubic yard, after the delivery of said stone, said several varieties of stone being all the kinds of stone required in the work of building and constructing, all of said stone to be delivered by the defendant to the plaintiff at Henry aforesaid, on board of canal-boats as said stone should be required by the plaintiff in the progress of said work of building and constructing said dam and lock, the cost of towage of said canal-boats from La Salle, Illinois, to Henry, aforesaid, to be borne by the plaintiff and defendant jointly.

And the plaintiff avers that, to wit, one hundred thousand cubic yards of each of said kinds and varieties of said stone were required to build and construct said lock and dam, to wit, at the district aforesaid.

And the plaintiff further avers that upon, to wit, the first day of February, at, to wit, the district aforesaid, the defendant undertook and faithfully promised the plaintiff to deliver to the plaintiff on board of canal-boats as aforesaid, at Henry aforesaid, all the stone that should be required in building and constructing said dam and lock as the same should be required in the progress of said work. And the plaint-
21 iff avers that afterward on, to wit, the first day of September, A. D. 1870, at, to wit, the district aforesaid, to wit, fifty thousand cubic yards of each of the several kinds of stone were required in the work of building and constructing said lock and dam; and the plaintiff then and there notified the said defendant that said stone were so required, and also notified him of the kinds and quality of the stone so required at said time, and then and there requested the defendant to deliver said stone at Henry aforesaid, on canal-boats as aforesaid, in accordance with the terms of said agreement.

And the plaintiff avers that he was then and there ready and willing to receive said stone and to pay for them, in accordance with the terms of said agreement, and to pay one-half of the said cost of towage of said canal-boats from La Salle aforesaid, to Henry aforesaid, of all of which the defendant then and there had notice at, to wit, the district aforesaid; yet the said defendant, not regarding his said promise and undertaking, would not, at said time nor at any other time, deliver said stone to the plaintiff at Henry aforesaid, on canal-boats as aforesaid, although often requested so to do.

By means whereof the plaintiff was obliged to procure, and did procure, other stone to build and construct said dam and lock, and was obliged to and did pay for said last-mentioned stone, to wit, ten
22 thousand dollars more than he would have been obliged to pay the defendant for the said stone so agreed to be delivered by said defendant to the plaintiff, to the damage of the said plaintiff in the sum of twenty thousand dollars.

By WILLIAMS & THOMPSON,
Attorneys.

(Endorsed:) Filed Jan'y 5, 1874. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 24th day of February, A. D. 1874, in the December term, A. D. 1873, of said court, in the record of the proceedings thereof in said-entitled cause is the following entry, to wit:

said defendant's said failure and neglect to deliver said stone to the plaintiff as aforesaid, as required in the progress of said work as aforesaid.

And whereby the plaintiff was hindered and prevented from completing said work of building said lock and dam in the time mentioned in his said contract with the said canal commissioners; and on, to wit, the first day of June, 1871, and by reason of being so hindered and prevented from completing such work on said 1st day of June, 1871, he was, in accordance with the terms of said contract, obliged to forfeit and pay, and did forfeit and pay to said canal commissioners, the sum of, to wit, three thousand dollars, to wit, at the district aforesaid; of all which defendant then and there had notice.

And also for that whereas heretofore, to wit, on the first day of February, A. D. 1870, at Chicago, Illinois, to wit, at the district aforesaid, the plaintiff being then engaged in building and constructing a certain dam and lock in the Illinois River, near Henry, in the county of
28 Marshall and State of Illinois, in said district, for the improvement of the Illinois River, under a certain contract then existing by and between the canal commissioners of the State of Illinois and the plaintiff, for the building of such dam and lock, said dam and lock to be built and constructed in great part of stone, the plaintiff, at the special instance of the defendant, bargained with the defendant to buy of the defendant, and the defendant then and there contracted and agreed with the plaintiff to furnish and deliver to the plaintiff, all the stone which should be required to build and construct said dam and lock, to be delivered to the plaintiff on board of canal-boats, at Henry aforesaid, from time to time and as the same should be required in said work of building said dam and lock, and in consideration thereof the plaintiff then and there promised and agreed to pay to the defendant for said stone, after the delivery thereof, as follows: For all canal-bank stone, one dollar and forty cents per cubic yard; for all vertical or battered wall or heavy rubble stone furnished from defendant's quarry, three dollars and thirty-eight cents per cubic yard; for all block and dimension stone, seven dollars and forty-five cents per cubic yard; the quantity of the said several kinds of stone which the said defendant should deliver to be, after the delivery thereof, ascertained from estimates made from time to time by the engineer in charge of the construction of said dam and lock; and in consideration thereof, and
29 that the plaintiff then and there promised to receive said stone, and to pay the defendant for the same as aforesaid, on, to wit, the day and year aforesaid, at, to wit, the district aforesaid, the defendant then and there promised the plaintiff to deliver said stone to the plaintiff, as aforesaid.

And the plaintiff avers that afterwards, and on, to wit, the first day of June, A. D. 1870, at the district aforesaid, in consideration of the said several promises and undertakings of the plaintiff, and that the waters of the Illinois River, upon which said defendant would be obliged to convey said stone by canal-boat to Henry aforesaid, from the western terminus of the Illinois and Michigan Canal, were low, and, by reason thereof, difficult of navigation, the defendant agreed to and with the plaintiff that, if by reason of said low water in said river he could not deliver said stone by canal-boat as aforesaid, he would send the same by railroad and deliver the same at Henry aforesaid on cars.

And the plaintiffs avers that afterwards, to wit, on the day and year first aforesaid, at, to wit, the district aforesaid, the defendant entered upon the execution and performance of said contract and agreement,

and did then and there deliver to the plaintiff, at Henry aforesaid, a portion of said stone so contracted to be delivered, to wit, fifty cubic yards thereof; and the plaintiff avers that afterwards, and on, to
30 wit, the first day of July, A. D. 1870, at, to wit, the district aforesaid, stone was required in the said work of building and constructing said dam and lock; that, to wit, one hundred thousand cubic yards of vertical wall and heavy rubble-stone, and, to wit, one hundred thousand cubic yards of block and dimension stone, were so required and needed at said time in the said work of building said lock and dam.

And the plaintiff avers that on, to wit, the day and year last aforesaid, at, to wit, the district aforesaid, he notified said defendant that said stone were required in building and constructing said dam and lock, and then and there requested the defendant to deliver the same to the plaintiff, according to the terms of said contract, and then and there demanded of the said defendant that he should deliver said stone to the plaintiff at Henry aforesaid; and the plaintiff avers that he was then and there ready and willing to pay for said stone according to the terms of said agreement, to wit, at the district aforesaid, whereof the said defendant then and there had notice. Yet the said defendant, not regarding his said promise and undertaking, did not nor would, at said time, nor at any other time, deliver said stone to the plaintiff, but on the contrary thereof the defendant wholly refused so to do; whereby the plaintiff was obliged to procure and did procure other stone
31 for the purpose of building and constructing said dam and lock, and was obliged to and did pay for the same, to wit, ten thousand dollars more than he would have been obliged to pay to the defendant for the said stone so contracted and agreed to be delivered to the plaintiff by the defendant, to wit, at the district aforesaid; also, whereby the plaintiff was obliged to and did pay for cutting such portions of said stone as needed cutting and fitting for use in said work, to wit, ten thousand dollars more than he would have been obliged to pay for cutting the said stone so contracted to be delivered to the plaintiff by the defendant, and whereby plaintiff suffered loss and damage in, to wit, the sum of five thousand dollars, by reason of not being able to keep his said men and teams, before then hired by him, properly and sufficiently employed in said work of building and constructing said dam and lock, by reason of the said defendant's said failure and neglect to deliver said stone to the plaintiff, as aforesaid, as required in the progress of said work, as aforesaid.

And whereby the plaintiff was hindered and prevented from completing said work of building said lock and dam in the time mentioned in his said contract with the said canal commissioners, and on, to wit, the first day of September, 1871, and by reason of being so hindered and prevented from completing such work on said 1st day of
32 September, 1871, he was, in accordance with the terms of said contract, obliged to forfeit and pay, and did forfeit and pay, to said canal commissioners the sum of, to wit, three thousand dollars, to wit, at the district aforesaid; of all which the defendant then and there had notice; to the damage of the plaintiff in the sum of twenty thousand dollars. Wherefore he sues.

By WILLIAMS & THOMPSON,
His Attorneys.

(Endorsed:) Filed Nov. 9, 1874. W'm H. Bradley, cl'k.

Pleas.

And on the same day, to wit, the 9th day of November, A. D. 1874, said defendant, by his attorneys, filed in said clerk's office his pleas in said-entitled cause; which said pleas are in the words and figures following, to wit:

In U. S. circuit court, nor. dist. Ill.

WILLARD JOHNSON }
v. }
EDWIN WALKER. }

And said def't, by his att'ys, Fuller & Smith, comes & defends the wrong & injury, when, &c., & says he did not undertake & promise, in manner & form as the said pl'ff has in his declaration above
33 thereof complained against him; & of this he puts himself upon the country, &c.

By FULLER & SMITH,
His Att'ys.

And for a further plea in this behalf the said def't, by his att'ys, Fuller & Smith, by leave of the court first had & obtained, says actio non, because he says that the contract & agreement between this pl'ff & said def't in said declaration set forth, & the only contract & agreement between them in the premises, was made & entered into prior to the 12th day of May, A. D. 1870, and that on said last-mentioned date, to wit, the 12th day of May, A. D. 1870, said contract and agreement was, without fault or default by or on the part of said defendant, terminated by the act of said plaintiff, & on that day absolutely ceased & determined, to wit, at the district aforesaid; and this said def't is ready to verify, &c.

By FULLER & SMITH,
His Att'ys.

And for a further plea in this behalf said defendant, by his att'ys, Fuller & Smith, & by like leave of court, &c., says actio non, because he says that while he protests that he never made or entered into any such contract or agreement as is in said declaration set forth, & that if he had, the same was void as in contravention of the statute of frauds, as hereinafter pleaded, yet, nevertheless, that long prior to the com-
34 mencement of this suit, to wit, on the 12th day of May, A. D. 1870, the said contract & agreement in said declaration mentioned, & which this defendant further avers is one & the same contract and agreement as set forth in each of the counts of said declaration, was, without fault or default by or on the part of this def't, terminated by the wrongful act of said pl'ff, to wit, at the district & on the day aforesaid, whereby this def't was damaged to the amount of twenty thousand dollars, for which damage said pl'ff is & has since been liable to this def't at the district aforesaid, and this def't hereby offers to recoup & set off said damages so sustained by him against any claim or demand of said pl'ff, which he seeks to recover herein, & def't avers the amount of such damages to be equal to & to exceed any amount which said pl'ff would or might otherwise be entitled to recover against him, said def't; and this he is ready to verify, &c.

By FULLER & SMITH,
His Att'ys.

And for a further plea in this behalf this defendant, by leave of court, &c., says that said pl'ff ought not to have or maintain his aforesaid action against him, said def't, because he says that the said supposed contracts & promises in said counts in said declaration mentioned (if there were any such) were made, & each of them was made, on or about the 6th day of November, A. D. 1869, and were not
35 to be performed within the space of one year from the making thereof; and said defendant further says that the said supposed contracts were not, nor was either of them, to be performed within the space of one year from the making thereof; and said defendant further says that the said supposed contracts were not, nor was either of them, nor was any memorandum or note thereof in writing signed by said def't or any person or persons thereunto by him lawfully authorized, according to the form of the statute in such case made & provided; and this he is ready to verify. Wherefore he prays judgment, &c.

By FULLER & SMITH,
His Att'ys.

And for a further plea in this behalf the said def't, by like leave of court, &c., says actio non, because he says that the said supposed contracts in said counts in said declaration mentioned (if any such were made) were, & each of them, was made on or about the 15th day of April, A. D. 1870, & were not, nor was either of them, to be performed within the space of one year from the making thereof, nor within the space of one year from the last day of April, A. D. 1870; and the said def't further says that the said supposed contracts were not, nor was either of them, nor was any note or memorandum thereof in writing signed by def't or by any person or persons thereunto by him lawfully authorized, according to the form of the statute in such case made & provided; and this he is ready to verify. Wherefore he prays judgment, &c.

By FULLER & SMITH,
His Att'ys.

36 And for a further plea in this behalf def't, by like leave of court, says actio non, because he says that the said supposed contracts & promises in said declaration mentioned, if any such were made, whenever the same were or either of them was made, were not, nor was either of them, to be performed within the space of one year from the making thereof; and said def't further says that said supposed contracts were not, nor was either of them, nor was any memorandum or note thereof in writing, signed by def't, or by any person or persons thereunto by him lawfully authorized, according to the form of the statute in such case made & provided; & this he is ready to verify. Wherefore he prays judgment, &c.

By FULLER & SMITH,
His Att'ys.

(Endorsed:) Filed Nov. 9, 1874. W'm H. Bradley, cl'k.

And on the same day, to wit, the 9th day of November, A. D. 1874, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLARD JOHNSON
vs.
EDWIN WALKER. } Assumpsit.

37 Now come the parties again, by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and after hearing the opening statements of the defendant's counsel, and a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 10th day of November, A. D. 1874, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLARD JOHNSON
vs.
EDWIN WALKER. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 11th day of November, A. D. 1874, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

38 WILLARD JOHNSON
v.
EDWIN WALKER. } Assumpsit.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 12th day of November, A. D. 1874, in the said adjourned October term of said court in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLARD JOHNSON
vs.
EDWIN WALKER. } Assumpsit.

Now come again the parties, by their attorneys, and now comes also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict.

Afterwards, to wit, on the 13th day of November, A. D. 1874, in the said adjourned October term of said court, in the record of the
39 proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

WILLARD JOHNSON } Assumpsit.
vs.
EDWIN WALKER. }

The jury in this behalf empaneled and sworn, this day returned into court their verdict as follows, to wit:

We, the jury, find the issue for the plaintiff, and assess his damages to the sum of six thousand and five hundred dollars.

And thereupon the defendant, by his attorney, moves the court for a new trial herein.

Motion for a new trial.

Afterwards, to wit, on the 14th day of November, A. D. 1874, said defendant, by his attorneys, filed in the said clerk's office his motion for a new trial in said entitled cause, which said motion is the words and figures following, to wit:

In U. S. circuit court, nor. dist. of Ill.

WILLARD JOHNSON }
v.
EDWIN WALKER. }

And now comes the defendant, by Fuller & Smith, his att'ys, & moves the court to set aside the verdict & grant a new trial herein for the following reasons, namely:

1. That the verdict is against the law.
2. That the verdict is against the evidence.
3. That the verdict is against the law, the evidence, & the weight of evidence.
4. That the court erred in refusing to instruct the jury in regard to the statute of frauds, as prayed by the defendant.
5. That the court erred in refusing to instruct the jury in relation to verbal admissions, as prayed by the defendant.
6. That the court erred in that part of the charge relating to the statute of frauds in instructing that the alleged contract was to be performed within the space of a year.
7. That the court erred in the construction put by the court upon the Farwell, Lake & Walker contract.
8. That the court erred in that part of the charge relating to the pl'ff stopping the performance of the alleged contract by the defendant.
9. That the court erred in not instructing the jury that if they believed from the evidence that def't was stopped without his fault, and the alleged contract rescinded, the pl'ff could not recover, unless the rescission was waived upon new and valuable consideration or its equivalent.
10. That the court erred in instructing the jury that modifications of existing contracts bind where there is no consideration for the alleged modification or modifications.
11. That the court erred in that part of the charge in relation to damages claimed by the defendant for the wrongful termination of the alleged contract by the pl'f.
12. That the court erred in not instructing the jury that a new agreement after the 12th day of May, 1870, not made with the intention of continuing the former alleged contract in force, would

not deprive the defendant of his defence arising upon the notice to stop performance of said original alleged contract.

13. That the court erred in the admission & exclusion of evidence.

14. That the court erred in refusing to instruct the jury that the pl'f could not recover under the declaration in this case upon a contract to deliver face or lock stone by rail.

15. And that the damages are excessive.

By FULLER & SMITH,
His Att'ys.

(Endorsed:) Filed Nov. 14, 1874. W'm H. Bradley, cl'k.

Amended declaration.

Afterwards, to wit, on the 27th day of November, A. D. 1874, said plaintiff, by his attorneys, filed in said clerk's office his two amended declarations in said entitled cause, which said amended declarations are respectively in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the circuit court of the United States

WILLARD JOHNSON }
vs.
EDWIN WALKER. }

42 And also for that, whereas, heretofore, to wit, on the twenty-eighth day of May, A. D. 1870, at Chicago, to wit, at the district aforesaid, the plaintiff having entered upon the performance of a certain contract and agreement then existing between the canal commissioners of the State of Illinois and the plaintiff, for building and constructing a dam and lock near Henry in said State of Illinois, for the improvement of the Illinois River, which said dam was to be constructed in great part of stone; that the defendant, at, to wit, the time and place aforesaid, entered into a contract and agreement with the plaintiff in and by which the said defendant promised and agreed with the plaintiff to furnish to the plaintiff all the stone which should be required for the completion of said dam and lock, said stone to be delivered to the plaintiff at Henry aforesaid, as the same should be required in the progress of said work of building and constructing said dam and lock, said stone to be of the form, description, and dimensions required for said work, the quantity of the several kinds of stone which the defendant should deliver to the plaintiff to be, after said delivery, ascertained from the estimates to be made from time to time by the engineers in charge of the construction of said dam and lock.

43 And the plaintiff avers that in consideration of the said promise and agreement of the defendant, he, the plaintiff, promised and agreed to and with the defendant to pay to the said defendant, and the said defendant then and there agreed to receive from the said plaintiff, for all the stone which should be required to complete said dam and lock, as follows: for all canal-bank stone, one dollar and forty cents per cubic yard; for all vertical or battered wall or heavy rubble-stone furnished from defendant's quarry, three dollars and thirty-eight cents per cubic yard; for all block and dimension stone, seven dollars and

forty-five cents per cubic yard, on, to wit, the day aforesaid, at, to wit, the district aforesaid.

And the plaintiff avers that the said varieties of stone were all the kinds of stone required to complete said dam and lock, and that, to wit, one hundred thousand cubic yards of each of said several kinds of stone were required to complete said dam and lock.

And the said plaintiff, relying on the said promise and agreement of the defendant, as stone were required on said work of building and constructing said lock, and on, to wit, the first day of July, A. D. 1870, at, to wit, the district aforesaid, and at divers other times, notified the said defendant that stone were needed in said work of building and constructing said dam and lock, and also at such time and times
44 specified the kind and quality of stone so required, and then and there demanded of the defendant the delivery of said stone at Henry aforesaid, in accordance with the terms of the said contract and agreement, and the plaintiff avers that at the said time and times that said stone were so required and demanded, the same were required in the work of constructing and building said lock and dam.

And the plaintiff further avers that the defendant, not regarding his said promise and agreement, neglected and refused to deliver said stone so required and demanded, as aforesaid, to the plaintiff, as aforesaid, at Henry aforesaid. And the plaintiff avers that he was then and there willing and ready to receive said stone and to pay for the same in accordance with the terms of said contract and agreement.

Whereby the plaintiff was greatly damaged and put to great costs and inconvenience in procuring other stone to construct and complete said dam and lock, and was obliged to pay and did pay for said last-mentioned stone, to wit, ten thousand dollars more than he would have been obliged to pay to the said defendant for the stone so agreed to be furnished by defendant to the plaintiff at, to wit, the district aforesaid, and whereby the plaintiff was obliged to and did pay for cutting said stone so procured in place of the stone which were so agreed to be
45 furnished by the defendant, to wit, five thousand dollars more than he would have been obliged to pay for cutting the said stone so agreed to be furnished by defendant at, to wit, the district aforesaid; and whereby plaintiff suffered great loss and damage in, to wit, the sum of five thousand dollars by reason of not being able to keep the men and teams before that time hired by him properly employed in said work of constructing said dam, the plaintiff then and there being unable to procure stone in sufficient quantities to keep such men and teams employed; and whereby and by reason whereof the plaintiff was hindered and prevented from completing said lock and dam in the time mentioned in his said contract and agreement with the said canal commissioners, and on, to wit, the first day of June, A. D. 1874, and by reason of the terms of said agreement and such hindrance, and being so prevented from fulfilling said agreement, he was obliged to forfeit and pay to and did forfeit and pay to said commissioners the sum of, to wit, three thousand dollars at, to wit, the district aforesaid; of all which the defendant then and there had notice. To the damage of the plaintiff in the sum of twenty thousand dollars, wherefore he sues by

WILLIAMS & THOMPSON,
His Attorneys.

(Endorsed:) Filed Nov. 27, 1874. W'm H. Bradley, cl'k.

46 The second count of the amended declaration, filed Jan'y 5,

1874, is amended by striking out the words enclosed in parenthesis and underlined with red lines.

Said count is further amended by adding thereto after the last line thereof as now written the following words, to wit: And whereby the plaintiff was greatly delayed in the completion of said work, and by reason thereof was unable to complete said work within the time limited in the said contract with the said commissioners for the construction thereof, and by reason whereof and in accordance with the terms of said last-mentioned contract, the plaintiff was obliged to pay and did forfeit and pay *and pay* to the said commissioners on account of such inability to complete such work within the time so limited, which time was by said contract the first day of June, A. D. 1871, the sum of, to wit, five thousand ($5,000) dollars at, to wit, the district aforesaid.

And whereby the plaintiff suffered loss in a large sum, to wit, five thousand ($5,000) dollars by reason of not being able to procure a sufficient quantity of stone to keep plaintiff's men and teams before that time hired properly employed at, to wit, the district aforesaid.

(Endorsed:) Filed Nov. 27, 1874. W'm H. Bradley, cl'k.

47 *Additional grounds for new trial.*

Afterwards, to wit, on the 8th day of December, A. D. 1874, said defendant, by his attorneys, filed in said clerk's office his additional grounds for a new trial in said entitled cause, which are in the words and figures following, to wit:

In U. S. circuit court, nor. dist. of Illinois.

WILLARD JOHNSON }
v.
EDWIN WALKER. }

And now comes the def't, by his att'ys, & as additional causes for new trial, says: That the verdict should be set aside & a new trial granted on the ground of newly-discovered evidence, & of surprise, as shown by the affidavits of Edwin Walker & W. H. Champion herewith filed, & also that the damages are excessive.

By FULLER & SMITH,
Def'ts Att'ys.

(Endorsed:) Filed Dec. 8, 1874, W'm H. Bradley, cl'k.

And afterwards, to wit, on the 27th day of January, A. D. 1875, in the December term, A. D. 1874, of said court in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

48 WILLARD JOHNSON }
v. } Assumpsit.
EDWIN WALKER. }

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, heretofore entered herein, for a new trial of this cause, and after hearing the arguments of counsel the court overrules said motion, and awards judgment, to which the defendant, by his attorney, excepts.

It is thereupon considered and adjudged by the court that the plaint-

iff do have and recover of the defendant the said sum of six thousand and five hundred dollars, his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of one hundred and forty dollars and thirty-two cents, and that he have execution therefor.

And on the same day, to wit, the 27th day of January, A. D. 1875, on the hearing of said cause the following exceptions were taken and allowed by the court, and made of record in said cause, and are in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States in & for the northern district of Illinois.

49 WILLARD JOHNSON } Bill of exceptions.
v.
EDWIN WALKER. }

Be it remembered that on the trial of this cause the plaintiff, to maintain and prove the issues on his part, gave the following evidence in substance, to wit:

WILLARD JOHNSON, plaintiff in this suit:

The last of October or 1st of November, 1869, I bought out Edwin Walker, J. K. Lake, and C. B. Farwell, who had a contract for the building of a lock & dam at Henry, Illinois, and paid $25,000 for it. I had bid for the contract, but it had been awarded to one Sherburne, who assigned it to them. Their contract with the canal commissioners was as follows:

49*a* STATE OF ILLINOIS:

Contract for a lock and dam for the improvement of the Illinois River.
1869.

ARTICLES OF AGREEMENT, made and concluded the twenty-first day of July, in the year eighteen hundred and sixty-nine, between Edwin J. Sherburne, Edwin Walker, and Charles B. Farwell, of the city of Chicago, county of Cook, and State of Illinois, of the first part, and the canal commissioners of the State of Illinois, of the second part, whereby it is covenanted and agreed as follows:

Contractors.

Canal commissioner.

The said Edwin J. Sherburne, Edwin Walker, and Charles B. Farwell, parties of the first part, hereby covenant and agree to furnish all the materials, which shall be of a sound and good quality, and perform all the labor necessary to construct and to finish, in every respect in the most substantial and workmanlike manner, a dam and lock, as the same are located, near the city of Henry, for the improvement of the Illinois River, including the canal above the lock, and all the necessary appendages thereto, embracing excavation, embankment, foundation, piling and timbers, lock and abutment walls, protection and slope walls, lock-gates and their fixtures, and every kind of work which is necessary to complete the same in perfect order for use.

Location of lock and dam.

Work included in contract.

Directions of chief engineer and specifications.

The construction of the aforesaid work shall be in all respects according to the directions of the chief engineer and to the specifications hereto annexed, which are to be considered a part of this contract.

Dismissal of workmen.

And it is further agreed that if at any time any overseer or workman employed by the parties of the first part shall be declared unfaithful or incompetent by the said engineer, the said party of the first part, on notice of such declaration, shall forthwith dismiss such person and shall no longer employ him on any part of the work.

Order of work.

And it is further agreed that this contract, in every respect, shall be prosecuted in such order and places in the work and at such time and seasons, as said engineer shall direct, and that the quantities of work done in each and every month shall be a fair proportion of all the work required by the contract.

Work to be done monthly.

And it is hereby mutually agreed that the parties of the first part will perform the work embraced in this contract, and that the said canal commissioners will pay out of the monies appropriated therefor in full compensation for the same the following sums and at the following rates:

[5-cent rev. stamp.]

1. For grubbing and cleaning, the sum of ($290) two hundred and ninety dollars.

2. For bailing and draining, as required in specification, being included in excavation, therefore no charge for the same, dollars.

3. For all earth-excavation, as provided in specification, at the rate of (70) seventy cents per cubic yard.

4. For excavation of all rock at the rate of ($3.25) three dollars twenty-five cents per cubic yard.

5. For embankment, as provided in specification, at the rate of (45) forty-five cents per cubic yard.

6. For lining, as provided in specification, at the rate of (57) fifty-seven cents per cubic yard.

7. For puddling, as provided in specification, at the rate of (60) sixty cents per cubic yard.

8. For loose stone in dam frieze wall to lock and elsewhere, at the rate of ($2.62) two dollars sixty-two cents per cubic yard.

9. For brush and gravel in any part of the work, at the rate of (50) fifty cents per cubic yard.

10. For brush and stone in any part of the work, at the rate of ($2.20) two hundred and twenty cents per cubic yard.

11. For slope and pavement wall, as required in specification, at the rate of ($3.50) three dollars fifty cents per cubic yard.

12. For vertical or battered rubble wall, laid in hydraulic cement, at the rate of ($7.25) seven dollars twenty-five cents per cubic yard.

13. For vertical or battered rubble wall, laid dry, at the rate of ($4.50) four dollars fifty cents per cubic yard.

14. For concrete masonry, at the rate of ($5.75) five dollars seventy-five cents per cubic yard.

15. For cut-stone masonry in lock-walls and culverts, as

provided in specifications, at the rate of ($16.25) sixteen dollars twenty-five cents per cubic yard.

16. For uncut masonry in lock-walls or abutments to dam, as provided in specification, at the rate of ($7.25) seven dollars twenty-five cents per cubic yard.

17. For white-oak timber in lock-gates and elsewhere, at the rate of ($63) sixty-three dollars cents per M feet, board measure.

18. For timber of all kinds in foundation to lock, at the rate of ($35) thirty-five dollars cents per M feet, board measure.

19. For timber of all kinds in construction of dam, at the rate of ($25) twenty-five dollars cents per M feet, board measure.

20. For plank and boards of all kinds in any part of the work, at the rate of ($26) twenty-six dollars cents per M feet, board measure.

21. For furnishing and delivering round bearing-piles, as per bill, at the rate of (12½) twelve and one-half cents per lineal foot.

22. For furnishing and delivering square bearing-piles, as per bill, at the rate of (23) twenty-three cents per lineal foot.

23. For driving round and square bearing-piles, measured in the work, at the rate of (8) eight cents per lineal foot.

24. For all wrought iron, as per specification, at the rate of (10) ten cents per pound.

25. For all cast iron, as per specification, at the rate of (8) eight cents per pound.

26. For all spikes and nails, either wrought, pressed, or cut, at the rate of (9½) nine and one-half cents per pound.

27. For English proof-chain for operating gates or any part of the work, at the rate of (19) nineteen cents per pound.

28. For lead and antimony cement for securing iron work, at the rate of (45) forty-five cents per pound.

49b 29. For sulphur and cement for securing iron-work, at the rate of ($450) four hundred and fifty dollars for the whole work.

30. For painting that part of lock gates and fixtures above water, at the rate of ($225) two hundred and twenty-five dollars per lock.

31. For snubbing-posts inserted, at the rate of (40) forty cents per lineal foot.

32. For composite valves, included in the insertion, at the rate of (85) eighty five cents per valve.

33. For

34. For

Compensation. Prices to be in full compensation.

The prices above specified are to be in full compensation for all materials and labor required to put the same into the work herein contracted for, and complete the same in all respects as provided in this contract.

Chief engineer to determine all questions.

And to provide for a speedy and just settlement and to prevent disputes it is hereby further mutually agreed that the chief engineer in charge of the work shall in all cases determine the amount or quantity of the several kinds of

work which are to be paid for under this contract, and the amount of compensation to be paid therefor, and shall, within ninety days after the work shall in all respects have been completed according to the terms and conditions of this contract, present a final account and estimate of the same, which shall be final and conclusive on both parties to this contract, and the canal commissioners will then pay to the parties of the first part the balance due, including the 15 per cent. retained on monthly estimates, in auditor's warrants on the State treasurer, or in cash, at the option of the party of the second part.

Final account in 90 days after completion.

Final and conclusive on both parties.

Pay balance.

And the said parties of the first part hereby further agree to perform all the work contracted for as specified in this contract, but any alteration in the form, dimensions, location, or manner of doing the work directed by the said engineer in charge beyond what is contemplated in the specification annexed which shall increase the cost of the same shall be done as directed; and the said engineer, with the approval of the canal commissioners, shall decide in writing what increased compensation shall be paid for such alteration, which writing shall be attached to and thereafter form a part of this contract; and the parties of the first part agree to do the work at the price or prices established by said engineer and approved by the canal commissioners.

Alteration.

Increased compensation.

In case any of the quantities exhibited at the letting shall be increased or diminished without changing the character of the work such increase shall be paid for at the prices contained in this contract for the same class of work, and the parties of the first part agree to do the work at the prices stipulated, without making any claim for damages in consequence of such increase or diminution.

Quantities increased or diminished.

No claims for damages.

And it is further agreed that approximate estimates shall be made at the end of each month, under the direction of said engineer, for all work done under the contract during said month; and that the amount of said estimates shall be paid in auditor's warrants on the State treasurer, or in cash, at the option of the party of the second part (less 15 per cent. retained as a guarantee for the performance of the contract), by the middle of the succeeding month.

Monthly estimates.

15 per cent. deducted.

No materials except cut stone shall be estimated until delivered on the work.

Only cut stone estimated until delivered.

And it is further mutually understood and agreed that in case the execution of this contract shall be suspended by the party of the second part on account of the lack of funds, or for any other cause, no claims for prospective profits on work done shall be made or allowed, but on the resumption of said work, the parties of the first part shall have the right to complete the same under this contract, and the party of the second part hereby reserve the right to suspend the work whenever the state of the finances shall require it, as provided in section eight of the "Act for canal and river improvements, approved February 28th, 1867."

Suspension of contract.

Resumption.

Commissioners to reserve the right to suspend.

It is further agreed between the parties that this contract, or any interest in the same, shall not be assignable to

Contract not assignable.

any person or persons whatever without the written consent or approval of the canal commissioners.

It is further agreed that in case the wages of laborers engaged on this work shall not be paid by the parties of the first part within thirty days after receiving the monthly estimate, the canal commissioners shall have the right to pay said laborers the amount which is satisfactorily found to be their due, and deduct the amount so paid from the next monthly estimate, or from the 15 per cent. retained as hereinabove provided. Laborers' wages.

And the said party of the first part further promise and agree to perform the several stipulations of this contract by themselves and workmen and under their immediate superintendence, and not by a subcontract or subcontractor. Subcontractor.

And it is further agreed that if, in the opinion of said engineer, the parties of the first part refuse or neglect to prosecute the work embraced in this contract, or shall violate any of its provisions, or perform the work in an improper manner, the said engineer shall certify the same in writing to the canal commissioners, who shall have power to certify and declare this contract has been violated and abandoned by said parties of the first part, and shall order the same relet to other parties in the manner provided by law. In case the contract shall be abandoned as above described, the 15 per cent. retained from the monthly estimates shall be considered as forfeited to the party of the second part. Violating contract. Engineer certify. Commissioners abandon. 15 per cent. forfeited.

And it is further agreed that the said Edwin J. Sherburne, Edwin Walker, and Charles B. Farwell shall commence the said lock and dam on or before the first day of August, eighteen hundred and sixty-nine, (1869), and complete the same by the first day of June, 1871, unless unavoidably prevented by high water in the Illinois river, in which case it shall be completed on or before the first day of September, eighteen hundred and seventy-one (1871). Completion.

And it is further agreed and understood between the parties to this contract that in case of delays arising in the progress of the work, either from neglect or inability on the part of the parties of the first part, which may retard the completion of the same by the specified time, said canal commissioners, or any one of them, may direct the chief engineer, or any other person, to employ a sufficient force, and purchase the necessary materials, to complete the work according to the specifications hereunto annexed; and all expenses incurred in the performance of such work shall be paid for by the canal commissioners on the certificate of said engineer, and the amount so expended shall be charged to the account of the aforesaid parties of the first part. Neglect to complete. Commissioners may order men put on. Charge the cost to contractor.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date first above written.

(Signed) EDWIN J. SHERBURNE. [SEAL.]
EDWIN WALKER. [SEAL.]
C. B. FARWELL. [SEAL.]
I. G. GINDELE. [SEAL.]
VIRGIL HICKOX. [SEAL.]
JOSEPH UTLEY. [SEAL.]

Canal Commissioners.

Witnesses:
(Signed) DANIEL C. JENNE.
Attested:
[SEAL.] JOSEPH UTLEY, *Secretary.*

49c STATE OF ILLINOIS:

Specification of the manner of constructing locks for the improvement of the Illinois River. 1869.

Character of walls. GENERAL DESCRIPTION.—Locks to be composed of hydraulic stone masonry, placed on a foundation of bearing-piles, timber and plank.

Dimensions of lock. The chamber to be 75 feet wide at top of walls, and 350 feet long between the upper and lower gate quoins.

Length of walls above and below gates. The side walls to extend 70 feet above the upper gate quoins, and 20 feet below the lower ones, at the head to terminate with rectangular wing-buttresses, at the foot with

Rectangular buttresses at head.

Length and plan of wings at foot. straight wings 40 feet in length, slightly curved at their connection with the main walls, and flaring each side 10 feet wider than the bottom line of chamber.

Culverts in wall. At the foot of lock culverts are to be constructed in each wall for the purpose of discharging the water in the lock, and culverts through the mitre-sill wall at the head to be used for filling the lock. The culverts at the foot in each

Commencement of culvert. case will commence in the gate recesses, and extend a suitable distance below the gates.

Grubbing and clearing. FIRST SPECIFICATION—*Grubbing and Cleaning.*—From the space required for the lock and its necessary banks, and for the canal connected therewith, all trees, saplings, bushes,

All wood to be removed or burned up. and roots shall be cut and grubbed up, and, together with logs, brush, and wood of every description, shall be burned up or removed from the ground, so as to do no unnecessary injury to the adjoining lands, as may be directed by the chief engineer or his assistant in charge of the work.

Bailing and draining. SECOND SPECIFICATION—*Bailing and Draining.*—Under this head is to be embraced all the expenses necessary for the construction of coffer-dams, including the materials and

Cost of machinery. their removal from the work, the cost of providing and operating machinery and pumps for bailing the water from

Removing ice and snow. that part of the work embraced in this contract, together with the removal of all ice and snow that may accumulate during the progress of the work.

Form of pit. THIRD—*Excavation of Lock-pit.*—The excavation to be made of such length, width, depth, and slopes as the said engineer shall require, and the bottom made smooth and

Deposit of materials. level to receive the foundation-timbers. The material exca-

vated to be deposited so as to form the embankment of the lock and the canal connected therewith as far as it can be done, and the surplus, if any, to be deposited at such points as said engineer shall require.

Excavation of Canal.—To be of such form, width, depth, and slopes as may be required, and the material excavated to be deposited in the banks of either the lock or canal, or, if there is a surplus, to be placed in spoil-bank, as the said engineer shall direct. Form of canal.

[5c. rev. stamp.]

FOURTH—*Foundation.*—Bearing-piles, from 20 to 30 feet long, and not less than 9 inches in diameter at the small end and 12 inches at the large end, are to be driven with a hammer weighing at least 1,600 pounds, and raised as high as leaders 35 feet long will permit. There shall be five rows of piles under each wall, and at least three rows in the chamber of the lock, and driven in rows crosswise, three feet apart from center to center. At the head, under the mitre-sills and wing-walls, the piles to be placed so as to conform to the shape of the walls. Bearing-piles—dimensions. Weight of hammer. Number of rows longitudinal; distance apart.

The piles, after being driven, are to be cut off true and even to receive the foundation-timbers. Piles cut off true and even.

The piles to be paid for as delivered for the amount contained in the bill furnished and as driven for the length they measure in the work, after being prepared to receive the foundation-timbers. Paid for delivery. Paid for driving.

Longitudinal timbers, 12x12 in. square, are to be placed on top of seven rows of the piles, three rows through chamber and two rows under each wall. On these longitudinal timbers and the other six rows of piles the main cross-timbers of the foundation are to be placed, six inches apart alternately over the piles, and extend the whole width of the foundation. All the timbers are to be 12 inches square, and of such lengths as may be required, in order to have the lap of splice come over the piles and on the longitudinal timbers. All the spaces, and for 3 inches under the cross-timbers, are to be filled with concrete. The timbers to be well bolted or strapped to the piles and longitudinal timbers with iron bolts or straps of such size and form as may be required. Under the lower mitre-sill the cross-timbers will be laid solid together. A course of 2½-inch oak and pine plank of uniform thickness to be laid on the cross-timbers, well jointed together, and secured by 6-inch pressed spike, and to cover the whole area of foundation. Longitudinal timbers. Cross-timbers. Dimensions. Spaces to be filled with concrete. Timbers to be bolted to piles. Planking.

A second course of 2-inch oak or pine plank to be laid over the first, between the lock-walls, secured by 8-inch pressed spike, and both courses of plank laid in the most approved manner for breaking joints with the timbers and each other. Second course planking. Plank to break joints.

Five or six courses of sheet-piling will be required across the lock-foundation, from four to six feet long, made of 2-inch plank, lined with inch boards, and well filled in with concrete on both sides. Sheet-piling.

After the second floor is laid, binding-timbers, 6 by 8 inches, are to be put on crosswise at every 10 feet, and bolted to the foundation-timbers with suitable ragged bolts, 20 inches long, to secure the planking from being raised by the action of the water. Binding-timbers.

Mitre-sills. Dimensions.

FIFTH—*Mitre sills.*—The mitre-sills are to be composed of best quality of white-oak timber, 20 inches square, for lower gates, and 12 by 20 for upper gates, laid on an angle of 21¼ degrees, with a line at right angles with the side walls.

Wall lower mitre-sill.

The timbers are to be well bolted to the foundation for lower mitre-sill and to the wall in upper mitre-sill. An arch of stone is to be laid on the foundation below lower mitre-sill, from 12 to 16 inches thick in one course, curved to a radius of 80.83 feet on lower side, and forming an angle on the upper side conforming to the mitre against which the timber is to rest.

Wall of upper mitre-sill. Culverts in upper mitre-sill wall. Dimensions of culverts.

The upper mitre-sill will be raised by a wall of masonry 8 feet high similar in external form to the lower mitre-sill, but there will be 8 culverts built through the lower part of the wall for the passage of water from the upper level into the lock. The culverts will be 5 feet wide and 4 to 4½ feet high, with segmental arches. The abutments will be 4⅝ feet thick, faced on both sides, and the top stone have a skew back for the arch to start from. The character of the masonry will be similar to other parts of the lock, and the top coped with stone not less than one foot thick.

Character of masonry. Masonry.

SIXTH—*Masonry.*—The walls are to be from 24 to 30 feet high, and to have a batter on the face of a half-inch to the foot. The faces of the recesses to be vertical. The main walls are to be five feet thick on top, and to have such batter and offsets in the rear as shall be required by the plan and directions of said engineer.

Thickness of walls. Buttresses. Offsets.

Buttresses, 8 feet long, 3 feet thick, and 15½ feet apart, to be placed at the rear of the main walls, and come up within 2½ feet of the top, and to have such offsets as may be required.

Breast-wall. Coping. Mitre-sill walls.

At the quoins and recesses the walls will increase in thickness to conform to the plan of masonry. Across the head of lock will extend a breast-wall 8 feet high and 8 feet thick at the bottom, carried up plumb on both sides to such height as may be required to an offset of one foot for the platform of valves to rest on. The balance of height will be 7 feet thick, with a coping 12 inches thick covering the whole width of the wall. Mitre-sill walls are to be built as described under the head of mitre-sills.

Rectangular buttresses at head. Wing-walls. Drop lower end.

Rectangular-wing buttresses, coped on top, are to be carried up to the full height of main walls, to extend above the breast-walls, and to be of such form as may be required. The wings at the foot will extend 40 feet on each side of main walls, to be slightly curved at their connection with them, and stand 10 feet at the ends from the line of chamber. The lower end of wings will drop from 8 to 10 feet, and built in a manner to make good connections with the protection-walls below of such forms and dimensions as the said engineer may require.

Recesses. Rear curved.

Recesses.—At each set of gates are to be recesses in the lock-walls, to extend from the hollow quoins, and to be of sufficient length and depth and of such form as to receive the gates when open. The rear of the recess to be curved, and to have in its full length a versed sine of about 18 inches.

Subrecesses shall be made in each recess of such dimensions as may be required. The end of recess opposite of quoin to be finished with a mitre. Subrecesses. Mitre-end.

In the upper recesses the walls are to have an extra thickness of one foot for the platform for valve-gates to rest upon.

Quoins.—The stone to be very nicely cut to a hollow of 14 inch radius, and the nose which connects the hollow with the main wall to be cut on a radius of $6\frac{55}{100}$ inches at top of coping, and the curve to increase with batter of face to bottom of wall. The heel of quoins to be beveled to the rear of recess. The stone are to be alternately header and stretcher, with not less than 5 feet length of face, and such width of bed as shall make, in all cases, a bond of one foot on the quoin at face and backing stone in the course below. Quoins. Radius of nose. Heel of quoin. Dimensions of quoin-stone.

In case uncut masonry should be used for the lock walls, the hollow quoins will be of cast iron, of such form as the said engineer may require, well turned or bored out in the hollow, and well and properly secured to the lock walls in such manner as may be required. Cast-iron quoins.

Culverts—Are to be built in the lock walls from the head of lower recess to rear end of wings, for the purpose of discharging the water from the lock. The side walls will be 6 feet high. They will be 5 feet apart, with vertical sides, and connected at the top by a semicircular arch of $2\frac{1}{2}$ feet radius, with 15 inch depth of arch-stone. Culverts at lower gates. Dimensions. Arch-stone.

The entrance to culverts to be from 6 openings in each recess, 3 feet square. From the culvert into the space below the lower gates there are to be four openings, $3\frac{1}{2}$ by 4 feet square, for the discharge. Entrance by six openings.

They are to be covered with cut stone, 12 to 15 inches thick, extending one foot on each side wall. On this covering is to be a 12-inch course of cut stone, on which the arch of the side culvert will commence. Covering.

There are to be two or more ventilating-holes of six inches diameter to each culvert, smoothly drilled or cut to the top of coping, and in them are to be inserted cast-iron pipes, with elbows turning from the lock, so as to allow the air to escape. Each pipe is to have a flange at the surface of the coping, with bolt-holes in it to secure the same to the walls, and the flange and bolts are to be neatly let in, secured with sulphur and sand cement. A well is to be built in the lock walls on each side, over the culverts, with proper recesses or rabbets for the insertion of valve-gates for discharging the lock, or, if required, the openings to culverts in recesses shall be prepared for receiving valve-gates or wickets, with suitable holes drilled through the walls for the insertion of the rods which may be used to operate the valves or wickets. Ventilators. Iron pipes with elbows. To be let into coping. Well for valves. Holes for valve-rods.

49d *Character of Masonry.*—The face of the wall to be composed of stone of a sound and durable quality, such as shall be approved by said engineer. The stone are to be laid in regular courses, and cut true and even, both on face and beds. The upper and lower beds to be parallel. The cutting to be done and the work to be laid with a mortar-joint on the face, which shall not in any case exceed one-fourth of an inch, and to have an average joint for the whole bed Manner of cutting. Joints. Faces. Bed.

of the stone which shall not exceed three-eighths of an inch.

Vertical joints. The vertical joints to be the same for 12 inches back from the face, and the balance averaging not over two inches.

Width of beds. The first course of stone laid on the foundation to have a top bed of 24 inches, and the second course 36 inches, alternating 24 and 36 inch beds to the coping, the 36-inch

Bond. course making 12-inch bonds on the backing in the course below. Each stone to have a bond on the other of not less than 12 inches; every course except the first must have

Headers. headers from 4½ to 6 feet in length, according to the thickness of the wall, and not less than 2½ feet in width on the face, laid in every 10 feet length of face, and the headers in

Succeeding course intermediate. each succeeding course must be placed intermediate to those beneath. The stretchers must have not less than 3½

Stretchers. feet length of face, and all the face-stone to be not less than

Thickness. 10 inches, nor more than 30 inches, in thickness, and when more than 24 inches the beds must equal the thickness. In

Heavy courses. all cases the heaviest courses must be laid in the lower por-

Masonry in culverts. tions of the structure. The masonry in culverts to be similar in character to other portions of the work, and the arch-stone for full depth of bed to be cut to an average of ⅜ inch joint on line of radius.

Backing. The backing to be composed of a good sound quality of stone, such as may be approved and required; to be laid

Laid in courses. generally in courses corresponding with the face; but two

Minimum and thickness 6 inches. Headers. courses may fill up one of face, provided neither are reduced below 6 inches in thickness. Headers are to be placed in like manner, and intermediate those in front. In no case must the backing rise higher than the face-stone, and no

Joints of backing. dressing will be permitted after being laid in the work. The bed-joints of the backing shall not be more than one inch, and the vertical joints 2 inches. The stone must all come

Beds in contact. in contact with beds and vertical joints, and especially with

Break joints 8 inches. the rear of the face-stone, and in all cases must break joints at least eight inches. No stone shall be less than 6 inches

Spaces. thick and 4 square feet of surface, and all spaces which are more than one foot square must have a stone properly fitted to it. No stone will be allowed to be quarried in the winter season, or when they will be affected by frost.

Coping. *Coping.*—The walls to be coped with cut stone not less

Thickness. than 15 inches in thickness, and generally of full width of wall, and cut to conform to the batter of lock, both front and

Width and length. rear. The coping generally to be 5 feet wide on top bed, and 3½ feet length of face, and more if required. For hollow quoins and recess-corners, the width will vary according to

Two stone. the thickness of walls, and in some cases two or three stone will be allowed to fill up the width. At the head and foot of lock and at the recesses for gates the coping is to

To be doweled. be secured by dowel-bolts 1¼ inches diameter, entering the second course below at least 6 inches, and if required at

At quoins. (Scrutiny stamp.) the hollow quoins a 2-inch dowel entering the masonry from 6 to 8 feet. At every joint

Clamps. there must be two iron clamps 18 inches long, 2 inches

To be let in. wide, and ¼ an inch thick, entering the wall 3 inches at the ends, and let in flush with coping. The bolts and clamps

to be secured by a cement of sulphur and sand mixed in such proportions as may be required, or a cement of lead and antimony in proportion of 85 to 15. The inside angle of coping in chamber of lock to be rounded to a curve of 3-inch radius. The coping to mitre-sills to be similar in character to that above described, and so cut as to conform to the shape of wall, and the whole to be clamped, dow'led, and cemented.

Cement.

Angle of coping to be rounded.

Mitre-sill coping

The expense of drilling and cutting for the insertion of all iron-work must be included in the price of masonry and iron, and the price of sulphur and sand cement, a separate price for the whole work in contract, and lead and antimony cement by the pound.

Expense of drilling.

Price of cement.

Cement, Sand, and Mortar.—The mortar used in the lock to be made from the best quality of hydraulic cement, and clean, sharp sand, free from all earthy impurities, mixed in the proportion of not more than two parts sand to one of hydraulic cement, and such as said engineer shall direct. No cement shall be used without being tested, and approved by said engineer or his assistants, and if by either of them pronounced unfit for work, it shall be removed entirely therefrom. The sand used must be clean, sharp, pure, silicious sand, free from *from* all impurities, and, if required, must be washed and screened.

Hydraulic cement.

Proportions.

Cement to be tested.

Character of sand.

The mortar to be mixed only when necessary for immediate use, and in no case must it be allowed to stand overnight. Grout must be mixed in boxes prepared for that purpose standing on the wall, generally in proportions of two parts of sand to one of hydraulic cement. The cement to be placed in the box first, and the water put in and stirred up, then the sand added, and all well mixed together with hoes. The stirring must continue all the time while the box is being emptied, and the quantity of cement must be sufficient to hold up the sand.

Mortar to be mixed.

Grout, and manner of mixing.

Stirring.

Method of carrying up the Masonry.—Suitable cranes or derricks must be provided for handling and laying the stone. The work is to be carried up in regular courses, and in no case shall there be more than two remaining unfinished. Each stone must be prepared to fit in its proper place before being brought on to the wall, and no cutting will be allowed on the work that will in any way disturb the masonry previously laid, and all face-stone, if required, are to have a hole drilled near the center, in the top bed, for the purpose of receiving the "Lewis" connected with the machinery by which the stone are to be laid, or if handled by other means, special care shall be taken to prevent injury to the stone or surrounding masonry. Every stone, both face and backing, must have a full bed of mortar to rest upon, so that all spaces between the two may be completely filled, in each course all the vertical joints to be filled with grout before the next shall be laid, and no space more than 10 feet square shall be left to be grouted, without mortar being placed in the joints to prevent the grout from running any further. Before placing the mortar upon it, the wall must be kept wet and free from dirt. All the stone, both face and backing, must be handled and laid by machinery,

Machinery.

Regular courses

Stone prepared to be laid.

Lewis hole to be drilled.

Full bed of mortar.

Vertical joints grouted.

Grout not to run over 10 feet.

Wall kept wet.

Handled with machinery.

and in no case will stone be allowed to be moved about on the wall.

Concrete. Dimensions of stone. *Concrete*—Must be made of clean, coarse gravel or fine broken stone of a size not larger than will pass through a ring 1½ inches in diameter. The cement and sand to be

Mixing. mixed together in the same manner and proportions as grout. The gravel or broken stone will then be mixed in until it shall form a compact mass, which will then be

Placed with shovels. placed in position by shovels, and, if required, well rammed down with heavy mauls.

Uncut masonry to be laid without cutting. Dimensions. Character. *Uncut Masonry for Lock Walls.*—In case it may be required by said engineer, the masonry of the whole lock shall be laid up without cutting, but the dimensions and form of the stone shall be the same as required for cut-stone work, and the general plan shall be carried out in the same

Cast iron. Hollow quoins. manner. If the uncut work should be adopted, the hollow quoins will be made of cast iron, properly secured to the wall, as specified under the head of quoins. The face of the

Face to be pitched. stone will be pitched off to true lines, and the face-joints be

Bolts in the wall. made not to exceed one-half inch. If required, bolts shall be laid in the wall at such points as may be necessary to secure fender-timbers to the face of wall.

High points. All high projecting points on the bed of stone to be picked off so that the stone will have a good bearing on each

Courses uniform thickness. other in their beds, and be of uniform thickness in each course.

Time of laying masonry. The masonry is all to be laid between the 15th day of March and the 15th day of October, unless otherwise ordered by said engineer.

Gates. SEVENTH—*Gates*—To be made of the best quality white-oak timber, entirely free from wane-checks, shakes, or de-

Dimensions of material. cayed knots. The quoin and mitre posts are to be 28 inches square, and may be in 4 pieces, if timber of the right size

Lower ribs. Description. cannot be obtained. The two lower and top ribs are to be solid, composed of 4 pieces of timber of such form as to make it 28 inches wide at the ends and 44 inches in the center, forming a curve on the upper side of 18 inches versed sine, straight on the lower side, and 12 inches thick.

Other ribs. The other ribs are to be similar in form, with one less timber, leaving an open space in the center with 3 vertical posts between, to hold the upper side in form of curve; each

Hog-chains. rib is to be strengthened on the lower side by double hog-

Bands and sockets. chains; each quoin-post is to have wrought bands on top and bottom, with a heavy cast-iron socket in the lower end and a wrought journal in the upper end, for hanging the

Cast step. gates. The sockets in quoin-post to rest on a heavy cast-

Straps on ribs and posts. iron step, well fitted to the foundation; wrought-iron straps are to be put on the quoin and mitre posts at each rib, and of such length as to admit of two bolts through the ribs in

Hanging. each strap. The gates are to be suspended, and swing on

McCarthy's plan. "McCarthy's plan" for opening and closing gates. This is

Description. done by suspension-bars of wrought iron on each side of the gate, extending from top of quoin-post to bottom of mitre-post, and passing over tower-posts placed on top of lock-wall, and connecting, by two heavy plates of iron and

Anchor-iron. steel pins, with six other bars of iron anchored in the walls of the lock.

Suitable turn-buckles or swivels are to be put into each suspension and anchor rod on either side of the tower to regulate and adjust the gates. The gates are to be planked on the upper side with 2-inch white-oak or pine plank, with 5½-inch pressed spike. Suitable fender plank are to be put on the lower side of the gates. The wrought iron used to be of first quality American iron.

Turn-buckles.

Planking.

Fender plank.

Capstans are to be constructed at each gate, with proper fixtures of levers, spars, ropes, and chains, for the purpose of operating the gates, or they may be worked with a gearing, meshing on a cogged bar of iron, and turned with cranks, as the said engineer shall require or direct.

Capstans.

Gearing.

EIGHTH—*Valve-gates* of cast iron, or composed of wood and iron, of such form as may be required, are to be inserted in the valve-platform above the upper gates, which are to be operated by levers at the sides of the lock. At the lower gates the valves are to be inserted in the side culverts, either in the openings in the gate recesses or in the main culverts, through a well in the walls below the gates, and operated by screws or levers from the top of the lock. If required, valves shall be inserted in the lower gates, and operated by levers from the top of the gate.

Valves in platform above upper gates.

In side culverts.

Operated by screws or levers.

NINTH.—*Embankment.*—The banks to be of such form and width as the said engineer shall direct, and to connect with the protection-work both at head and foot of lock.

Embankment.

The top to be finished level and uniform; and, if required, to be neely paved with quarried stone, set up edgewise, from 12 to 18 inches in depth, and laid in a bed of gravel at least 6 inches deep. Such portions of bank in the rear of lock walls as may be required shall be composed of loose stone. At the head of lock, and at other places where the bank may have to be made impervious to water, the materials shall be carefully assorted and well puddled.

Form of top. Pavement.

Loose stone in rear of lock-walls.

In the progress of the work the bank shall be kept one foot below the unfinished walls at all times.

One foot below walls.

Lining

TENTH—*Lining.*—Under this head is to be included all the materials which are required to make the bank impervious to water. All gravel required to be placed in rear of slope or vertical walls; also, on top of embankment and outside slopes, to prevent washing. In all cases where lining shall be obtained from places where other portions of the same bank have been, no allowance will be made for it, but the material must be carefully assorted, and paid for as embankment.

Description.

Paid for as embankment.

ELEVENTH—*Puddling.*—The materials for puddling shall be composed of clay or clay-loam, intermixed with a suitable proportion of fine gravel, the whole to be well incorporated and laid in courses nine inches thick.

Puddling. Composition.

Laid in courses.

49e It shall be wetted, so as to work into a solid, impervious state, by cutting through it vertically both ways with a shovel, in courses not exceeding ¾ of an inch in width, until the whole shall be rendered compact and water-tight.

Manner of working.

The compensation for puddling will be for the work after the materials have been delivered, and the measurements will be taken after the whole shall have been completed.

Compensation.

25 per cent. shrinkage.

The materials will be paid for either as lining or embankment, as the case may be, with an allowance of 25 per cent for shrinkage in puddling.

Slope-wall.

TWELFTH—*Slope and Pavement Wall.*—Where slope wall may be required, a suitable space shall be formed in the excavation or left in the embankment, so as to leave room for the thickness of gravel lining and wall.

Gravel lining in rear.

Laid at right angles to face.

The wall shall be of such dimensions as said engineer shall direct, and laid at right angles to the face, in a compact, smooth and suitable manner, proper bond being given to the joints. If necessary, a gravel lining to be placed in rear of wall, from 6 to 12 inches thick, for the stone to rest upon.

Stone to be generally headers.

Stone to be of suitable size to make good bonds, to be generally headers reaching through the wall. If necessary, a foundation of timber shall be placed under the wall.

Apron below lock.

Stone pavement.

At the foot of lock, an apron is to be extended down from 50 to 100 feet, made by a pavement of stone laid across the whole width of bottom between side or protection walls, and formed of good square stone, 18 inches wide, set edgewise, well bedded in gravel, and, if required, the joints filled with mortar or grout, in which case it shall be classified as vertical wall laid in hydraulic cement. If directed, a similar wall to be laid on the top of bank by the side of lock and protection walls.

Laid in mortar or grouted.

Banks paved.

Vertical walls.

THIRTEENTH—*Vertical or Battered Rubble Walls*—Laid in hydraulic cement or dry, shall be constructed at such points and of such form and dimensions as the said engineer may direct.

Protection walls.

At the upper and lower ends of lock, protection walls will be laid on the inside, commencing on a foundation of timber and plank, with bearing piles, if required, and raised to top of river-bank.

Outside walls.

On the outside a wall will be built the entire length of lock, and the protection walls at head and foot, and, if necessary, connect with the abutment wall of dam.

Circular ends.

The inside and outside at the upper and lower ends to be connected by a circular end wall.

Character of wall.

The wall to be composed of sound, well-shaped and durable stone, not less than 6 inches thick, and 4 feet area of bed.

Points on beds to be hammered.

The smoothest and broadest bed shall in all cases be laid down, and if the setting bed is uneven, the projecting points shall be hammered off, and all high points shall be removed from the top bed in order to give each stone a firm bearing.

Face-stone.

Headers.

The face-stone must have good beds and joints, and form a good face line. One fourth of the wall shall be composed of headers extending through it for a wall three feet thick, and from 3½ to 5 feet back for thicker walls.

Coping.

Laid in cement.

The walls to be coped with stones at least 10 inches thick, extending across the whole width of wall, with joints not more than half inch. When required, the wall to be laid in hydraulic-cement mortar, in proper proportions of cement and sand, as may be directed; and, if required, the beds laid in mortar, and the vertical joints grouted.

Snubbing posts, white oak.

FOURTEENTH—*Snubbing Posts.*—At least 20 good snubbing posts will be required, to be of white-oak timber, 8 feet long, and 12 inches in diameter, set in the ground 5½ feet, and well filled around with loose stone and gravel.

If required, cast-iron posts shall be set opposite the chamber of lock on the walls, well anchored down. Cast iron.

FIFTEENTH—*Stop Gates.*—Suitable stop-gates shall be made both at the head and foot of lock, for shutting off the water so that the lock can be pumped out at any time when necessary. The stop-gate to be made according to the plan of said engineer, and, if required, checks shall be cut in the walls, to receive the same, and timber secured to the foundation in proper form to receive and hold the lower end of plank to be used in forming to the gate. Stop-gates head and foot. Checks in the walls. Hold end of plank in gate.

SIXTEENTH.—For a more full and perfect explanation of the form and dimensions of materials and parts and of the manner of constructing them in all their details, plans, with bills of timber and iron, will be furnished by the said engineer or his assistants, who will also give such directions from time to time during the progress of the work as will in every respect render it complete and perfect on the plan contemplated in the above specifications, and said plans, specifications, and directions must in all respects be complied with. Plans and bills of timber to be furnished. Engineer to give directions. Must be carried out.

49*f* STATE OF ILLINOIS:

Specification of the manner of constructing a dam for the improvement of the Illinois River. 1869.

GENERAL DESCRIPTION.—The dam to be built of timber cribs, filled with loose stone, to be properly filled in with brush, stone, and gravel, both above and below, to have stone abutments at each end of the dam, and to have a row of square piles driven close together on the lower side of apron. Timber cribs. Brush, stone, and gravel. Apron.

FIRST SPECIFICATION—*Bailing and Draining.*—Suitable coffer-dams shall be built at each abutment, and machinery and pumps used to remove all the water from the pit, in order to excavate the same, to put in the foundation and construct the abutments. All materials and labor, machinery and pumps to be put in and removed, and the bailing done, for a specific price for bailing and draining. Bailing and draining. Mach'n'y & pumps. All to be removed.

SECOND—*Excavation.*—The excavation of the abutment pits for the dam, and for the protection walls above and below, shall be of such form, width, depth, and slope, as may be required, and the materials deposited where the chief engineer shall direct. The bottom to be made smooth and even for the reception of the work. Excavation. Form and dimensions. Bottom smooth and even.

THIRD—*Foundation of Abutments.*—Three rows of bearing piles, 3 feet apart, are to be driven under each abutment, from 15 to 25 feet long, 12 inches diameter at the large end, in such form as the shape of the abutments may require, to be cut off true and even on top to receive the timbers. On these piles are to be placed three timbers 12 x 12 inches square, and to be secured to the piles by a bolt three-fourths to one inch diameter, 24 inches long, to each pile, or by iron straps. The space between the timbers and around the piles to be well filled with concrete. If required, sheet-piling shall be put in across the foundation, connected with Bearing piles. Length. Timber on piles. To be bolted to piles. Concrete—sheet piling.

Plank. sheet piling on the upper side of dam, and possibly with one row in the lock. On this timber 2-inch plank are to be well spiked with 6-inch spike. On this foundation the masonry of the abutments is to commence.

Masonry. FOURTH—*Masonry.*—The masonry in the abutment is to be composed of a good quality of sound and durable stone, laid in such form as may be required. The character of the

Kind of stone. [illegible] work will be the same as the uncut masonry

Character. in the lock specification, to be coped with dressed stone 12

Coping. inches thick, of such width as will cover the top of the wall

Dowels and clamps. from 3 to 3½ feet, and to be doweled to the wall below, and

Cement. well clamped at the joints on top, the clamps to be let in, and all the iron secured with a cement of sulphur and sand.

Length of dam FIFTH—*Dam.*—The length of the dam will be from 600

Width. to 800 feet between abutments, 35 feet wide on the bottom, including 15 feet of apron, and from 11 to 14 feet high,

Excavation and how paid for. as may be required. If necessary, the foundation of the dam will be excavated by dredging, so as to make a uniform and even depth between the abutments, for a space of 35 feet in width; the excavation to be paid for at the same

Materials moved in boats. price as all the other earth excavations, and the materials taken on boats to such points as may be required by said engineer. That part of the dam below water-mark will be

Built of cribs below water. built in cribs of square timber, 35 feet long and 20 feet

Compartments. wide, divided up into compartments of not more than 10 feet square, as the plan of the engineer may indicate. The

Manner of framing. timber in crib to be 10 by 10 and 12 by 12 inches square, framed and locked together as may be directed, secured with suitable bolts at each crossing, and sunk side by

Sinking cribs. side, the longest length down stream, so as to fill the entire space between the abutments, and each crib, as sunk, filled

Filled with loose stone. with loose stone. The top of the cribs must be built so as to make a uniform level across the stream.

Superstructure. On the top of cribs the superstructure of the dam is to commence, which will be 27½ feet wide for 3 feet of the rise, and 20 feet wide for the balance of height, except what it

Apron is reduced by the upper slope of the dam. On the lower side of cribs, an apron of square timber, 12 inches thick, is

Ragged bolts. to be laid crosswise, 9½ feet wide, close and tight together, and bolted to the timber below with ragged bolts from three-

Square piles. fourths to one inch square, and 22 inches long. This apron

Dimension of piles. is to project over the cribs one foot, to cover a row of square piles which are to be driven close together the entire length

Lining plank. of dam, between abutments, the piles to be 12 inches square and from 15 to 25 feet long, as may be required, each pile to be secured to the top timbers of cribs by bolts from three-fourths to one inch square, 22 inches long, well ragged, and the tops cut off true and even for the apron to cover. If necessary, a lining of 2-inch plank is to be driven over the piles and breaking joints.

Description of superstructure The superstructure of the dam is to start on the cribs and apron by 3 longitudinal timbers, 12 inches square, and one 10 by 12 inches square, extending beween abutments, properly lapped together and well bolted to the apron and tim-

Cross timbers. bers below. On these longitudinal timbers, cross timbers 27½ feet long by 10 inches square are to be placed at every

10 feet apart, and over the cross timbers in cribs. Both timbers are to be framed so as to lock together, leaving spaces of 6 to 8 inches between the timbers. A second series of longitudinal timbers is to be locked to the last cross-timbers, 8 by 12 and 10 by 12 inches square. A second series of cross-timbers is to be placed on the last timbers, 12 by 10 square. On the lower side another apron, 12 inches thick, is to be placed, 8½ feet wide, filling up the spaces between the cross timbers, and properly bolted to the timbers below. This apron is 3 feet above the first one, and forms a drop in the dam of 3 feet. On this apron there is to be an offset in width of dam of 7½ feet, leaving the same 20 feet wide. The balance is to be raised 4 feet, and to be built in a similar manner, up to the coping, as the other part of the dam, with the exception of a slope on top of 4½ feet up stream. The last or top finishing will be by a coping of timber 8 inches thick at the lower end, and 4 inches at the upper, laid on the longitudinal timbers, and well bolted with ragged bolts.

Manner of framing.

Second apron.

Height of drop.

Offset.

Sloping upper side.

Top finish of coping plank.

The upper face of dam is to have a course of sheet-piling the whole length between abutments, to be driven into bed of river 4½ feet, making the entire length from top of dam 12 feet. A course of lining is to be put over the sheet-piling of the same length, and breaking joints with the first course. On the top of dam is to be a longitudinal timber, 8 by 12 inches, bolted to the coping 7 feet back of lower side, to hold the brush and gravel.

Sheet-piling upper face.

Lining to piling

Timber on top.

SIXTH.—*Brush and Gravel* is to be placed on the upper side of dam, sloping back from the top of longitudinal timber on coping, to a point on bed of river about 50 feet above the crib-work, filling the entire space between the abutments.

Brush and gravel.

Distance above timber work.

Below the apron, brush and stone are to be filled in from top of lower apron, sloping down to bed of river at a distance of 20 to 30 feet, to be placed in alternate layers of brush and stone, as the engineer shall direct.

Brush and stone.

Alternate layers.

If vertical or battered *babble* walls, laid in cement or dry, are required for protection, they are to be built of a character described in the lock specification. Also, the same in regard to slope or pavement walls.

Vertical wall.

Character.

Slope and pavement walls.

SEVENTH.—For a more full and perfect explanation of the work required in this dam, plans of all the various details, together with bills of materials, will be furnished by said engineer or his assistants, who will from time to time give such directions as may be necessary to carry out the work in conformity with the plan, and the directions and plans must in all cases be complied with.

General explanations and requirements.

49*g* *Notice to contractors.*

STATE OF ILLINOIS:

IMPROVEMENT OF THE ILLINOIS RIVER.

Lock and dam to be built near the city of Henry.

JULY, 1869.

The face-stone for lock must be of the most durable quality, to resist the action of frost and weather, and all the stone for lock and abutments

to dam must be obtained from such quarries as shall be required by the chief engineer.

All loose stone for the work can be obtained from surplus rock materials deposited along the bank of the Illinois and Michigan Canal, near Lemont, about 25 miles south of Chicago. The stone will be furnished free of charge at that point, and no tolls will be charged on the canal for their transportation.

It is expected that a large proportion of the stone for vertical, slope and pavement walls, can be obtained from the same point. If so taken, the same conditions will apply as above for loose stone.

Contractors will not be compelled to obtain the stone from the point above mentioned, but it is left to their option to procure them where it will be most for their advantage, providing they are of the quality required.

Contractors will be allowed to obtain the timber for the foundation to the lock, and for the construction of the dam, including the bearing piles, at any point along the Illinois River where it is most convenient, providing the quality is such as the aforesaid engineer will accept. Or pine timber can be obtained from the pine regions of Michigan and Wisconsin, via Chicago by water. The coping and apron to dam must be of hard timber.

The timber for the gates and valve platform, must be of the best quality of white oak, and will have to be procured in Indiana or Michigan.

No materials will pass on the Illinois and Michigan Canal, toll free, except the stone taken from the spoil banks along the canal.

[5-cent rev. stamp.]

49h *Schedule of the quantities of different kinds of work required for a lock and dam for the improvement of the Illinois River, located at Henry.*

Quantities.	Measure.	Items.	Price. Dolls.	Price. Cents.	Aggregate. Dolls.	Aggregate. Cents.
1	Number	Grubbing and clearing				
1	"	Boring and draining				
41,000	Cubic yards	All earth excavation in				
100	"	Rock excavation				
15,000	"	Embankment				
2,500	"	Lining				
1,200	"	Puddling				
5,600	"	Loose stone in dam, breze wall and elsewhere				
6,000	"	Brush and gravel in any part of the work				
1,000	"	Brush and stone " "				
2,750	"	Slope and pavement wall				
2,500	"	Vertical or battered rubble wall laid in hydraulic cement				
1,000	"	" " laid dry				
1,330	"	Concrete masonry				
10,900	"	Cut stone masonry in lock walls and culverts				
580	"	Uncut masonry in lock walls and dam abutments				
107,000	M. ft. B. M	White oak timber in lock gates and elsewhere				
517,000	"	Timber of all kinds in foundation to lock				
558,000	"	" " in construction of dam				
273,000	"	Plank and boards of all kinds in any part of work				
68,000	Lineal feet	Furnishing and delivering round bearing piles				
13,200	"	" " " square " "				
81,200	"	Driving round and square bearing piles				
120,000	Pounds	All wrought iron				
28,000	"	All cast iron				
25,000	"	All spikes and nails, wrought, pressed or cut				
2,000	"	English proof chain				
500	"	Lead and antimony, proportion 85 to 15				
1	Number	Sulphur and sand cement for whole work				
1	"	Painting lock gates and fixtures above water				
300	Lineal feet	Snubbing posts inserted				
24	Number	Composite valve inserted				
		Total				

[5-cent rev. stamp.]

49*i* *Contract bond.*

Know all men by these presents, that we, Edwin J. Sherburne, Edwin Walker, Charles B. Farwell, Charles Wenthe, and Benjamin F. Ray, of the city of Chicago, in the county of Cook, and State of Illinois, are held and firmly bound unto the people of the State of Illinois in the sum of ($91,000) ninety-one thousand dollars, to be paid to the said people: for which payment, well and truly to be made, we bind ourselves, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this twenty first day of July, in the year eighteen hundred and sixty-nine.

The conditions of this obligation is such that, if the said Edwin J. Sherburne, Edwin Walker, and Charles B. Farwell, who executed the annexed contract for constructing a lock, and near the city of Henry, for the improvement of the Illinois River, shall in all respects well and faithfully execute and perform the same, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed)	EDWIN J. SHERBURNE.	[SEAL.]
"	EDWIN WALKER.	[SEAL.]
"	C. B. FARWELL.	[SEAL.]
"	CHARLES WENTHE.	[SEAL.]
"	B. F. RAY.	[SEAL.]

Signed, sealed, and delivered in presence of—

[5 c. rev. stamp. 25 cent rev. stamp.]

STATE OF ILLINOIS,
Cook County, ss:

On this twenty-sixth day of July, 1869, before me appeared Edwin J. Sherburne, Edwin Walker, C. B. Farwell, Charles Wenthe, and B. F. Ray, who acknowledged that they executed the within instrument, and I certify that I know the persons who made the said acknowledgment to be the individuals described in and who executed the said instrument.

Given under my hand and notarial seal.

(Signed) [SEAL.] EDWARD G. MASON.
Notary Public.

49*j* Whereas the canal commissioners of the State of Illinois did, on the twenty-first day of July, in the year eighteen hundred and sixty nine, enter into written contract with Edwin J. Sherburne, Edwin Walker, and Charles B. Farwell, for the construction of a dam and lock near the city of Henry, for the improvement of the Illinois river;

And whereas it is provided in said contract that it shall not, or any interest in the same, be assigned to any person or persons whatever, without the written consent or approval of the canal commissioners;

Now, therefore, we, the undersigned canal commissioners, do hereby approve of the assignment of said contract to Willard Johnson, of Fulton, Oswego County, State of New York.

It is expressly understood that in the approval of the assignment of said contract, that the said Willard Johnson shall furnish security satisfactory to the commissioners for the faithful performance of said contract, by giving a bond for ninety-one thousand ($91,000) dollars, signed by himself and at least two other responsible men.

Dated at Henry, Dec. 14, 1869.

(Signed)	JOSEPH UTLEY.
"	VIRGIL HICKOX,
"	ROBT MILNE,
	Canal Commissioners.

[SEAL OF THE BOARD OF CANAL COMMISSIONERS, STATE OF ILLINOIS.

49k I, W. N. Brainard, secretary of the board of canal commissioners, specify that the annexed contract, specifications, and approval of assignment, are true copies of the originals now on file in this office.

Witness my hand and the official seal of the board of canal commissioners this 30th day of September, A. D. 1875.

[SEAL.] W. N. BRAINARD,
Secretary.

CANAL OFFICE,
Lockport, Ill's, Sept. 30, 1875.

50 This contract was assigned to me in writing, & these are the assignments:

Know all men by these presents that we, Charles B. Farwell and Edwin Walker, of the city of Chicago, in the county of Cook and State of Illinois, for and in consideration of the sum of one dollar, to us paid by Willard Johnson, of Fulton, Oswego County, New York, do hereby sell, assign, transfer, and set over to the said Willard Johnson all our right, title, and interest in and to a certain contract bearing date the 21st day of July, 1869, and executed by us, the said Farwell & Walker and one Edwin J. Sherburne, of the first part, and the canal commissioners of the State of Illinois, of the second part, for the construction of a lock and dam near Henry, Illinois, the interest hereby assigned being a three-fourths interest in said contract.

In witness whereof we have hereunto set our hands and seals this 6th day of November, A. D. 1869.

C. B. FARWELL. [SEAL.]
EDWIN WALKER. [SEAL.]

Sealed, signed, and delivered in presence of—
JOHN J. MCCLELLAN.

[Stamp.]

STATE OF ILLINOIS,
Cook County, city of Chicago, ss:

51 On this 6th day of November, A. D. 1869, before me, a notary public, residing in the city of Chicago, in the county and State aforesaid, came Charles B. Farwell and Edwin Walker, to me known to be the persons described in, and who executed the foregoing, instrument of assignment, and acknowledged severally that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and notarial seal at Chicago aforesaid this 6th day of November, A. D. 1869.

[SEAL.] JOHN J. McCLELLAN,
Notary Public.

[Stamp.]

For value received of Willard Johnson, I do hereby sell, transfer, assign, and make over to him all my right, title, interest, and claim whatsoever of, in, and to a certain agreement between the canal commissioners of the State of Illinois, of the one part, and Walker Farwell and Co., composed of Edwin J. Sherburne, Edwin Walker, and Charles B. Farwell, of the other part, for the construction of a dam and lock near the city of Henry, on the Illinois River, in the State of Illinois, dated July

twenty-first, 1869, reference to which is hereby made for greater certainty.

This agreement is to be void and inoperative unless said commissioners shall consent, in writing, to such assignment, and accept said Johnson in place of said Walker, Farwell and Company in the per-
52 formance of said contract, and surrender and cancel the bond heretofore given by said firm to said commissioners or the State of Illinois, and now held by them conditioned for the full performance of the same; and also to be void unless the said Johnson shall duly perform said contract and complete said work according to the said contract and specifications, and save and keep harmless the said firm and the said J. K. Lake and Edwin J. Sherburne of and from all liability or expense in, about, or growing out of said contract.

In case of a failure by said Johnson to perform said contract, it shall be lawful for said Lake to enter upon said work, and complete the same in all respects as if this had not been made, and in that case said Johnson shall forfeit all unpaid dues otherwise coming to him under said contract.

J. K. LAKE. [SEAL.]

In presence of
A. C. STORY.

I gave them a bond to hold them harmless, & substituted my bond to the canal commissioners for the one they had given, & procured assent to the assignment. Their agreement between themselves was as follows:

53 Articles of agreement made and entered into this 23d day of July, A. D. 1869, by and between Charles B. Farwell, Edwin Walker, and Jamas K. Lake, all of the city of Chicago, in the county of Cook, and State of Illinois.

Whereas the contract for the construction of a lock and dam near the city of Henry, in the State of Illinois, for the improvement of the Illinois River, was, on the 22d day of July, A. D. 1869, by the canal commissioners of said State, duly awarded to the said Farwell and Walker and one Edwin J. Shadburne, and the said Shadburne having duly sold, assigned, and transferred all his right, title, and interest in and to
54 the said contract to the said James K. Lake:

Now, therefore, this agreement witnesseth that the said Farwell, Walker, and Lake hereby mutually covenant, promise, and agree, to and with each other, to execute, perform, and fulfil said contract in all things as required thereby, in accordance with the following covenants, promises, conditions, and stipulations, as between themselves, relating to the respective rights, interests, and duties of said parties in said contract, and in the performance of the same.

That the said Farwell shall have the sole and exclusive control and management of all financial affairs relating to or growing out of said contract, and the sole right to receive and receipt for all moneys due or to grow due upon said contract, and to draw, make, and sign all notes, checks, drafts, and writings obligatory and binding upon the parties hereto, and necessary to the work and business of carrying out said contract.

That neither of the said parties hereto shall make or incur any debt, contract, obligation, purchase, or disbursement of moneys to be binding upon said parties, or in their name, or on their account, without the assent and concurrence of one or both of the other of said parties, and

then only for and on account of the matters and things pertaining to said contract, and necessary and proper to the due performance of the same, and all contracts for labor and material for said work shall,
55 as far as practicable, be made payable in auditor's warrants.

That the said Farwell and the said Walker shall furnish, in equal proportions, all moneys necessary for carrying out said contract, from time to time, as the same shall be required.

That the said Lake shall give his interest and undivided attention, care, skill, and diligence in the performance of such services and duties in and about the work and business of the performance of said contract as the said parties hereto, or any two of them, shall direct, so far as the same shall be reasonable and necessary for the efficient prosecution of said work.

That the said Walker shall furnish all the stone required for the construction of said lock and dam, to be by him delivered on board of canal-boats at Henry aforesaid as the same may be required in the progress of said work, said stone to be of the form, description, and dimensions required for said work, for which the said Walker shall receive the following rates for all such stone so delivered as aforesaid, to be paid in warrants of the auditor of the State of Illinois, to wit: For all canal-bank stone, one dollar and forty cents per cubic yard; for all vertical or battered wall or heavy rubble stone furnished from his quarry, three dollars and thirty-eight cents per cubic yard; for all lock and di-
56 mension stone, seven dollars and forty five cents per cubic yard. The cost of tonnage of canal-boats loaded with said stone from La Salle to Henry shall be borne by the parties hereto.

The quantity of the several kinds of stone which shall be delivered as aforesaid shall be ascertained from the estimates made from time to time by the engineer in charge of the construction of said lock and dam.

That the net profits resulting from the performance and fulfillment of said contract, after deducting all of the expenses thereof, shall be divided among said parties, as follows, to wit: the said Farwell shall receive three-eighths of said profits. The said Walker shall receive three-eighths of such profits, and the said Lake shall receive two-eighths of such profits, and the losses, if any, shall be borne by the said parties in the same proportion.

That neither nor any of said parties shall knowingly do or permit to be done any act or thing that shall in law or equity or by the terms of said contract work a forfeiture of the same, or of any right, advantage, or privilege growing out thereof or dependent thereon.

That in case either or any of said parties shall intentionally fail, refuse, or neglect to keep and perform any of the covenants, promises, or agreements on his or their part to be kept and performed, as
57 hereinbefore stipulated, the party or parties so intentionally failing, neglecting, or refusing, shall forfeit to the other party or parties, if the other party or parties so elect, all his or their right, title, and interest in and to the said contract, and all profits resulting therefrom, and such right, title, and interest and profits shall be fully vested in such other party or parties.

That in case of the death of either of said parties, the survivor or survivors shall complete said contract without interference on the part of the legal representatives of such deceased party or parties, being subject, however, to account to such legal representatives for such share of the net profits as such deceased party would have been entitled to receive if still living. That neither of the said parties shall receive any

part of the profits of said contract till the said contract shall have been fully completed and the net profits ascertained.

That each and all the covenants, promises, and agreements herein made by said parties respectively shall be binding upon their respective heirs, executors, and administrators, so far as the same may be capable of being kept and performed by such heirs, executors, and administrators.

That nothing herein contained shall be construed to prevent the said Lake from bidding upon or entering into any other contract, provided his so doing shall not cause him to neglect or fail to give due
58 attention to the work of constructing said dam & lock as aforesaid.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

C. B. FARWELL. [SEAL.]
EDWIN WALKER. [SEAL.]
J. K. LAKE. [SEAL.]

In presence of—

This Farwell, Lake & Walker contract was not assigned in writing, but was handed to me at the time. & Walker said he would furnish stone under it if I desired; would carry out that contract. In a few days I notified him that I wished him to do so. He commenced delivering stone the next spring on the contract.

Riffraff, or loose stone, is what is termed in the contract "canal-bank stone." He delivered stone to the last of May or first of June, 1870, and stopped. Can't say why. Presume it was low water. Saw Walker three or four times during the summer. Requested the engineer, M'r Jenne, to go up there and examine stone that Walker said he was going to ship. Jenney said he couldn't accept it. Requested Walker to fill his contract according to the agreement, he having agreed to deliver by rail if he couldn't by water. Identify letter of May 6. It is as follows:

59 CHICAGO, 6 *May*, 1870.

W. JOHNSON, Esq.:

DEAR SIR: I went to see the general freight agent and he said they will take down the stone for $3.00 p'r yard, or $15.00 per car. So there will be no danger of getting stone down fast enough.

I shall have to put in a switch and set up a derrick at Joliet. In the mean time, I am sending down two loads of good stone p'r day.

If you are not coming here before the 12th of this month, please send me your note 30 days for $6,000.00, for my pay.

Yours, respectfully,

EDWIN WALKER,
P'r W. B. CHAMPION.

60 The occasion of the letter was, that Sanger & Steele had made an offer to deliver stone from Joliet at the same price Walker was to be paid. I told M'r Walker I had an offer from them to fill that contract for the same price by rail that I was to pay him by boat, & as the river was low I was afraid he would not fulfil his contract. He said if he couldn't send the stone by boat he would by rail, and we went to railroad superintendent's office, and that letter is the result of that conversation.

From the first of June, usually, until the close of the season, there is

not over 18 inches of water on the bars in the Illinois River, and it was impossible to get the stone there by boat. I had several conversations with him during the summer, and in every one he promised to go right to work and get them out and deliver them at the Rock Island depot, at Joliet, and have them shipped. Walker delivered but three stone, after he stopped, to my cutters to cut. He promised to deliver by rail, in conversation last of May or 1st of June; but he never did. He had delivered all the riffraff on the contract. I saw Walker there three or four times during the summer of 1870. He complained that the engineer was requiring better stone than he wanted to deliver. I urged upon him that I wanted lock stone, and that lock-stone was what was needed, and he promised to furnish the required amount; but he
61 never did. Wrote Walker on getting a letter from canal commissioners, dated Sept. 9, urging me to push the work; that unless he immediately furnished the stone I should have to contract with some other party; and, after waiting a reasonable time, I did. I contracted for 1,200 yards of vertical stone, with Adams, in 1871.

Cross examination:

Saw Walker once that summer at Henry; once or twice at Chicago; once latter part of May; once first of September at Lemont, where his quarries were. In September, it was about the time the stone-cutters went up there. Early in May, I was at R. Island depot, in Chicago, with M'r Walker. I was at Henry two or three days that month. Can't say ever wrote Walker more than one letter. This is it:

HENRY, *Sept. 2d*, 1870.

EDWIN WALKER, Esq.:

DEAR SIR: I sent M'r Hayes to your place expecting that you would have some stone quarried, that he could set some cutters to work; but he returned saying that you had not one piece. He will come up again Tuesday, and you must have a plenty of stone out, so that he may have plenty of work. These stone must be had promptly. The commissioners were here on his return, and were much disappointed that you had no stone quarried, as all of the stone for cutting must be got out
62 this month. I will be there in the course of next week myself and look over the stone matter with you.

Yours, truly,

WILLARD JOHNSON.

Will not swear I was at Lemont after Sept. 2. Conversations when he said he would deliver were latter part of June. Conversation last of July or 1st of August when I asked Jenne to go up & look at the stone Walker claimed to have got out. Had no difficulty with Walker about canal-bank stone. Conversation with Singer & Steele about furnishing stone was the latter part of April, at Delevan House, Albany. Sanger & Steele offered to furnish stone in April. I think I saw Walker in the summer of 1870 as often as once every month. I saw him once in Henry. He said I might put in the switch track as quick as I pleased, & he would have the stone ready to deliver as fast as wanted.

63 J. L. JOHNSON.

Was bookkeeper and cashier for plaintiff, doing the work at Henry. Plaintiff procured from others than defendant the following: Of Sanger and Steele, 6,082 cubic yards of lock or dimension stone, at the price of $4.45, and we paid 3 80 freight, making $8.25 per yard; 715 yards vertical stone at a cost at Henry of $5.90; of Singer and Tolcott

466 yards of lock stone at a cost, with freight added, of $8.30; of Adams, 1,223 yards of vertical stone, at a cost of $5.00 delivered. Towage from La Salle to Henry, on lock stone, was 50 cents; on loose stone, 30; vertical, between 30 and 50. We had 150 to 250 men employed.

Cross examination:

I was at Sauger and Steele's quarry one day in May or June; all the men did not work all the time. There was a good deal of material on hand when we first went there in December, 1869. Nearly all put in the work ultimately; think none of the stone procured from Sauger and Adams was delivered in the summer of 1870.

Redirect:

First stone from Sauger was last of September, or first of October, 1870; first from Adams in April, 1871. Think that in May or June when I went up to Walker's to give him some money, he said he was going to send the stone right along according to the contract; this was at his quarry. Saw Walker at Henry late in the winter of 1870–'71; think had no conversation in relation to the delivery of the stone.
64 Willard Johnson had an interview with him. Don't think it was as late as August or September, 1870.

D. C. HAYES.

Stone cutter for Willard Johnson. I saw Walker at Henry some time in June. Was sent by him to Walker's quarry, at Lamont, to cut stone, I believe in August. Told Walker so. He said he would get some stone cut and did three stones. Cut them in three days. Had three men. Told Walker wanted stone; he said he would get them cut. Was there about three weeks. Talked with Walker or his foreman nearly every day. Said they'd get stone out. Finally Walker said he wouldn't or couldn't. Gave as a reason, that the engineer was requiring a better quality than he expected, and also that he got a better price on other contracts he had. Walker had stone being quarried that would have suited my purpose. They were being shipped. Asked for some of these stone, and he refused. It was the latter part of August. Telegraphed or wrote to Johnson that Walker would not furnish the stone. Johnson came there, and at his request I went to Sauger and Steele's quarry, and I think he made a contract with them. When Johnson came up, don't know whether he had conversation with Walker or not. I was receiving $5 per day, and the men $4. They received wages during good weather. Not many rainy days while we were at Lamont. Fare from Henry to Joliet was $4 for four of us, each way, and from Joliet to Lamont, $1.65. Wages for all, $17 per day. Stone was
65 in courses. By going from Walker's to Sauger's, we had to reduce the stone in thickness from two to three inches. Walker's stone was the softest, and the difference in labor was, in my judgment, ten per cent. I don't think there was enough of Sauger's stone up to Dec. 2, 1870, to keep the men employed. That of the quarries of that kind of stone closed about Oct. 15th. That stone can't be quarried in the winter, on account of moisture and frost. Stone can be laid later than it can be quarried, if the engineer permits.

(The witness was then asked if Johnson could have got in the stone for that lock that winter if he had had it. To which def't objected, but the court overruled the objection, and def't then and there excepted. The witness replied in the affirmative.

Witness was asked whether it was more economical to cut stone in

the winter than summer. To which def't objected, but the court overruled the objection and def't excepted. The witness said it was, as there is little work, and cutters cut cheaper. Generally about ten cents a foot difference on that stone; $1.35 per yard. Cost $1 per yard to reduce Sauger's stone, and 10 per cent. per yard on account of hardness; 40 or 50 c. per foot.)

Cross-ex.:

Wells was Willard Johnson's manager, general superintendent. Alexander Hayes was foreman. Don't think he was at Henry in May, 1870. About one-third of the face stone received before Dec. 2
66 from Sauger and Steele's was extra thickness. There was but one lock. Took about 3,000 yards face stone. No stone came from Walker's by rail. None delivered by boat from Walker's quarry after May 29th. Saw Walker's foreman at the quarry in August. His name was Thompson or Tomlinson. No question raised at Walker's about canal-bank stone. We had only a small force at the lock during the summer; twenty one to two men—reduced to six most of the time. I was at work during the summer on stone delivered before May 29th. Possibly saw Johnson during the summer once a month. Think so. Alexander Hays is dead.

BENJAMIN F. WELLS.

Had general supervision of the work at Henry during Johnson's absence. Work commenced Nov. 6, 1869, and ended Jan. 16, 1872. First stone were from Walker's quarry. We received the last May 15th; none after that time. Up to May 15th, 1870, Walker had not supplied sufficient stone to complete the work within the time named in the canal contract. Plenty of riprap; not sufficient face nor backing stone. Up to May 15th we had difficulty in *the* reference to quality, the State officers objecting; there was a good deal of conglomerate—at least a quarter. It was not fitted for lock masonry; frost would crack it. The State officers rejected them for face-stone, and we used them for backing. Had conversed with Walker before May 15th in *the* refer-
67 ence to quality of stone he was furnishing. Went to his quarry three or four times, commencing first part of April. Walker said he had some poor ones; better ones were coming. Went back twice, because no improvement; was instructed by the engineer, Jenne. Last time I went was fore part of May. The stone sent in May did not answer the purposes. The commissioners ordered me to stop the delivery of any more of that kind of stone. I sent a telegram as follows:

(The Western Union Telegraph Company. Dated Henry, Ill., May 12th, 1870.)

To EDWIN WALKER:

I cannot receive any stone shipped from your quarry after this day; have written particulars.

B. F. WELLS.

P'd.

I wrote the particulars in a letter. This is it:

HENRY, ILL., *May 12th*, 1870.

EDWIN WALKER, Esq.,
Lemont, Ill.:

DEAR SIR: My orders from Willard Johnson are, if you did not send

stone from the canal-bank that I must stop receiving stone from your quarry entirely. Last evening I received telegram from M'r Hays, our foreman, to the effect that there were no derricks put up for loading stone from canal bank. I have extended the time several days later than Johnson gave me, but I can wait no longer. Therefore I cannot receive any stone shipped from your quarry after this day, the 12th of May, 1870.

68

I have been inclined to give you all the time possible, and more than was allowed to me for you to send stone from the canal bank. It looks very much indeed as if you did not intend to ship any from that point. I must obey orders. I remain your true friend, as ever.

Yours, truly,

B. F. WELLS,
Ag't for Willard Johnson.

Walker was to furnish stone from the canal bank, and did send some, until the engineer said he had plenty.

In June, Walker came to Henry and had a discussion with Johnson about his filling the balance of the contract, & then he agreed to do it. He said he was not going to let another person have the work to do, & he would get them down by rail; would go home & make arrangements for shipping from Joliet; would take them by boat to Joliet & then transfer to railroad. Think this was June 22d or 23d. Nothing said then about canal-bank stone. We had plenty of riffraff. They were to set up derricks on the canal bank with reference to vertical stone. No tolls were charged on canal-bank stone which belonged to this State. All the riffraff was canal-bank stone.

69

I had a conversation with Walker in June, in which he agreed to resume the delivery of stone. No stone was sent by Walker after conversation in June. The last stone he delivered arrived May 15. D. C. Hayes was sent to Walker's quarry to cut stone. Walker said, "Send your men out; I will deliver stone to them to be cut." We received no stone cut by Hayes. Had not sufficient stone from May 15 down to Dec. 30 to keep the men employed.

(The witness was asked why did you not make other arrangements for stone after May 15? To which def't objected. The court overruled the objection, and def't excepted. The witness answered: Because we were living on Walker's promises. To which answer def't objected, & the court overruled the objection & def't excepted.)

Jenne, the engineer, urged for more stone. The canal commissioners were on the work in September, concluded we were short of materials & that the work was not progressing as fast as it should. We had until Sep'., 1871, to complete, & the failure of the stone put back other work. That was about the only thing that put back the work. It was necessary to get the stone in advance of the work. From May 15 to Sept. 30, 15 or 20 men were comparatively idle for want of material. We were paying them from $2 to $5.50 per day. We employed them in jobbing. We could not discharge them, because we did not dare to run the risk of hiring others when we wanted them, and some worked by the month. Think Johnson lost $20 a day from May 20th to Sept. 30th.

70

First stone from Sanger's quarry, Sept. 30th. It was thicker & harder than Walker's. Additional expense was occasioned by cutting down & doubling in; 600 yards cut down, at $1 a yard, in my judgment. Hauling the stone from depot cost $1. The three stones cut at Walker's

quarry after June were never received at the work. The conversation at Henry in June was in M'r Smith's house.

The damages by delay up to January 16th, 1872, in wages, were about $2,500 to $3,000.

We were delayed about three months. The stone should have been there in 1870, so as to have been cut in the winter. Would have completed the work by 1st of November. Have no experience in quarrying. I am not a stone-mason.

Cross-examination:

Conversations with M'r Walker in relation to quality of stone were in April, 1870; not later than May 10th. The objection to the stone was to using it for face-work. All Walker's stone was put into the work somewhere. No objection was made to the stone delivered by Walker in the fall of 1869 to my knowledge. I commenced to superintend Nov. 6th, 1869. No stone was delivered from that time until about April 1st. Talked with Walker about canal-bank stone in April.
71 Canal bank stone at $1.40 per yard means riffraff. There was vertical stone on the canal bank. Alexander Hays went away about May 12th. The Hays spoken of in my letter of May 12th was Alexander Hays. Riffraff is generally loaded by wheelbarrows, not derricks. "Derricks" in my letter refers to vertical stone. Walker had delivered all the riffraff necessary. Loose stone & riffraff are the same. Walker talked with me about setting up a derrick & loading large stone from canal bank. M'r Johnson wrote me a letter that Walker must put up derricks and load stone from the canal bank, or else must stop. The letter of May 12 does not refer to the telegram. They refer to different subjects; one refers to canal bank stone & the other to condemned stone. I can't say whether I wrote any other letter May 12 or not. Couldn't swear I wrote May 12 about condemned stone; won't swear I wrote two letters May 12. Walker agreed in April with me to deliver stone from the canal bank. Nothing said about price. There was perfectly good vertical stone in the canal bank. Walker said so. Stone for backing this work could be loaded, as many as ten canal-boats full, without moving the derrick, 50 to 55 yards to a boat. Enough vertical stone there to build twenty or thirty such locks.

At the time of the conversation at Henry, from June 20 to 25th, the water was low in the river. It was low from June to January, &
72 then commenced rising. Walker & I never closed any bargain as to price for loading vertical stone from canal bank. We talked about $60.00 a boat-load, and he said he would go on and load some and then see. We preferred vertical stone from the canal bank, because they were toll-free—cheap stone. The transportation was all there was of it. Walker agreed to load canal-bank stone for vertical wall & take it to Henry in his boats in April. I sent up derricks to Walker & then Hays went up, & I learned from Hays the derricks were not put up, & we got no vertical stone at all from the canal bank. This canal bank stone was stone taken out in deepening the canal. I saw some being taken out in March, 1870. A great deal was taken out in the winter. That is not usually good. Walker talked of $60 per boat-load. His non-compliance with this agreement is what the letter of May 12 refers to.

D. C. JENNE.

Civil engineer. Had charge of the lock & dam at Henry. The work was commenced Aug. 25d, 1869. Johnson took the work about Nov. 6th or 8th.

Walker delivered to Oct. 31st, 1869. Loose stone, 5,150 yards: slope-wall stone, 550 yards: vertical-wall stone, 770 yards: backing, 1,760 yards: face-stone, 10 yards. The vertical & slope wall stone was good, the face-stone was good, but not in large proportion, because some of that which was sent as face I estimated as "backing."

73 The entire amount for the completion was 5,000 yards loose stone; 1,000 yards brush & stone mixed: slope, 2,750 yards; vertical in cement, 2,500; vertical laid dry, 1,000 yards: concrete masonry, 1,750: rubble masonry, 580: cut stone masonry, 10,000 yards. Backing is about two thirds to one-third face. The most important stone to the contractor was that for the lock-walls. There was a flood in the fall of 1869, and the work of commencing the foundation could not be commenced. It was important to the contractor to have the stone for the cutters to prepare them for the work. There was a large amount of face-stone, which it took a long time to cut. The face stone should have been furnished within the time from the commencement of the work down to September, October, or the fall of 1870. The face-stone should have all been delivered during 1870, & a portion of the backing. A portion of the backing could have been delivered down to July, 1871. The contractor had the benefit of three months in case of high water. The water was low in July, 1870, & in June was too low for good navigation: continued so during the year.

We required vertical stone wall at the first. We would not use ordinary wall stone until the coffer-dam was built. Vertical stone was first used at that lock. Walker delivered no stone after May 15th. Up to that time he had delivered 2,753 yards backing: 1,371, vertical; slope wall, 665: loose stone, 6,591 yards. That includes the previous estimate. It was not in proper proportion as, sufficient face stone

74 was not delivered. Think there was not sufficient quantity of vertical wall-stone. First boat load delivered I objected to on account of dries, not fitted for face-stone, and I did not accept them for face but did for backing. Until a stone is cut you cannot always tell whether it be damaged or not. The stone delivered in the spring were inferior to those in the fall. Considerable conglomerate came & was used for loose stone.

May 31, 1870. Went to Walker's quarry with Mr Johnson. Walker was pumping water out. He was getting out some good face-stone from upper courses, a few, & loading a boat. Stone was poor, and advised him to square them up, & not ship so much waste. He said he would, and would deliver by rail at same price if he could make arrangements with railroad company, and would go and see to it. Subsequent arrivals up to May 15th did not show much improvement, and I objected to Wells. I told Walker when I went there what stone we required. Told him we wanted face stone. He said he could furnish them, & ship to Joliet and transfer from canal to railroad, if he could arrange with railroad company.

May 11th. I went to stone-beds with Wells and found the poorest load yet sent. Directed my assistant to leave out conglomerate. One boat measured only 11 yards, another 50. Boats average 65 to 70 yards.

This was in Wells' presence. Told Wells to direct Walker not to

75 send more of that kind of stone. Did not call on Walker with Johnson after May 15th. Was at Walker's quarry with Mr Milne, one of the commissioners, April 26th, 1870. Told Walker did not want conglomerate at all. There was good stone there.

Johnson was in Henry, May 23d, and went to Chicago May 24th to see about stone. Next saw him May 28th; next June 20th. He left

May 23d without my knowledge, and I wrote him at Fulton, New York, in regard to stone. I don't know anything about Johnson's and Walker's arrangements. We estimated vertical stone, if fit for the purpose, without reference to where it came from. In September the canal commissioners instructed me to notify Mr. Johnson the work must proceed more rapidly, and must be completed within the time required by the contract. Johnson did not then know these directions, but I wrote him Sept. 9th at Fulton, New York. Saw Johnson Sept. 15th. He said Sauger and Co. had 2,500 cubic yards of stone that would do for lock, which he could get at Walker's prices. He would go and contract with them. The first stone arrived at depot Sept. 29th. The work was finally completed about middle of January, 1872. $1,200 was charged M'r Johnson for non-fulfilment of contract. Walker had large enough force of men in 1870 to have got all the stone out.

Cross-examination:

76 There was a flood all the summer of 1869. It went down the latter part of September. This contract was originally awarded to Johnson, but Sherburne & Co. had bid lower, got it; and they were succeeded by Farwell, Lake, and Walker. Wells had general charge for Johnson. Water got low in June, and a person could not tow canal-boats from La Salle to Henry after June 1st. The river rose in November; it went down in 1871 about the same time. Before the lock and dam were built at Henry the usual boat-season, during which boats loaded with stone could be towed from La Salle to Henry, would be three or four months in the year, including both spring and fall.

In the season of 1869 there was good water to Oct. 1st. There was a flood that year. It would usually be 3 or 4 months. Navigation usually opened 1st of April. You could get boats from La Salle to Henry for about two months, or a little over. In talking with Walker, I may have suggested carrying by rail, as the water would get low. It was mentioned incidentally. The quarry was on the Alton road. Henry was on the Rock Island. The stone would be transferred at Joliet. Walker was to deliver at same price as by contract, but nothing said about the cost. Have no recollection of anything said about who would pay the railroad for transportation. The conversation related to lock-stone alone.

77 It is 90 miles from Joliet to Henry by rail; 26 or 27 miles from La Salle to Henry by rail. There is no trouble in taking stone on the canal to La Salle. The trouble was between La Salle and Henry on the river. No recollection of any discussion about taking the stone by canal to La Salle, and there transferring. The water passage between Joliet and La Salle might have been discussed; don't recollect. It is 74 miles from Lemont to La Salle by canal. Dimension stone is lock-stone and cement-masonry. Battered wall and heavy rubble comes under the head of vertical stone; lock and dimension under the head of face and backing. Canal bank stone is riffraff. Slope wall is loose stone. All the stone delivered by Walker was used in one of these dams.

Calculating from the beginning, it would be necessary for all the stone, under the contract, to be delivered by June or July 1st, 1871, in order to enable the contractor on the lock to comply, but the largest portion should have been delivered in 1870, as the thing ran; that is from July, 1869. The contract was drawn with reference to the time within which the work could be reasonably done. The work was to be

commenced Aug. 1st, 1869, and completed June 1, 1871, unless high water prevented; in which case by Sept. 1.

Don't remember any specific conversation with Walker after May 3d, 1870. The first boat passed through the lock about the middle of December, 1871. It was then practically completed.

BENJAMIN SMITH:

78 Was at Henry in summer of 1870, about last of May or 1st of June. Willard Johnson and Walker had a conversation at Henry in my presence and that of J. L. Johnson and M'r Wells, if I am not mistaken. Johnson was talking to Walker about stone not coming in, and wanted to know why. Walker gave some reason, that he had so many to furnish to other places that he could not get men to quarry them. Johnson was speaking about getting stone from Sauger & Steele's, and Walker said, "I don't want you to do that; I will get the stone myself, according to the old contract." Walker said he had a Chicago contract, on which he got better prices, and it bothered him to give stone to them. Nothing was said about delivery by rail. They were speaking of face-stone. Walker said, "I'll furnish the stone; send your cutters on." Johnson told him he would. Walker said, "send the next week."

Willard Johnson recalled.

My recollection has been refreshed by M'r Jenne's testimony. Walker told me, 28th or 29th of May, that he had seen the railroad men, and they had agreed to transport the stone for $3 a yard, same as for Sauger & Steele, and he would deliver by rail. I never had any other contract with Walker, fixing prices or anything of that character, except the written contract of Farwell, Lake and Walker. It is to that I refer in speaking of the contract. M'r Walker was to deliver the stone

79 to me, at Henry, free of charge, for $7.45. It is 60 miles from Joliet to La Salle, and the tolls are ten mills a mile on dimension, dressed, and eight mills on dimension, rough.

Cross-ex.:

Walker said, the 27th or 28th May, he would deliver the stone at his contract price by rail. This referred to lock-stone. I did not expect rubble or vertical by rail. We were talking about lock-wall stone. No one present but Walker and me. The final settlement with Walker for what he had delivered up to May 15th, was made about June 22, and he was paid. I can't swear whether he was at Henry at that time or not. Sent Alexander Hays to Walker's latter part of May or fore part of June. He was there before, in April. I had no other contract with Walker than his agreement, by word of mouth, to fulfil the written contract between Farwell, Lake, and Walker.

JOSEPH UTLEY.

Canal commissioner. Had supervision of lock and dam at Henry. In April, 1870, urged upon Johnson the necessity of getting material together rapidly, as otherwise he would not be able to complete his job in time. Frequently told him during 1870. There was a larger quantity of backing delivered than of face-stone; that was the trouble early in the season of 1870.

ROBERT MILNE:

80 Canal commissioner. Visited Walker's quarry to look at stone the latter part of 1870. M'r Jenne was present. Did not find very much stone suitable. Don't remember seeing Walker.

Cross-ex.:

This might have been in the spring of 1870.

Defendant's proofs

The pl'ff here rested his case, and the def'ndant, to maintain and prove the issue on his part, adduced the following testimony:

EDWIN WALKER:

Def't in this case. Farwell, Lake, and myself had the contract with the canal commissioners for the lock at Henry. We entered into a partnership agreement to carry out the contract, which I have here.

(Witness produced agreement between Farwell, Lake, and himself, being the same as that introduced in evidence by the plaintiff.

Willard Johnson purchased my interest, and that of Farwell and Lake, in the canal contract in November, 1869. Our outstanding contracts for lumber, &c., were transferred to Mr. Johnson by written assignment. It was left optional to Johnson to take stone at the price named in agreement between Farwell, Lake, and myself. I showed him the prices. I told him if he wished to purchase elsewhere he could. If he wanted I should furnish any portion of them at any particular time; I should be willing to do so, and help in any way I could.

I retained my agreement with Farwell and Lake. This conversation was in November, 1869. I did not see Johnson again until the
81 next spring—in April—when he came down to Lemont from Chicago with me, and said he was looking for stone. He wanted me to go down with him, and we went together. As we passed along by the canal on the railroad, he saw the canal-bank stone, taken out in the enlargement of the canal, and asked me what kind they were. I told him unfit for use, except for riffraff, the kind he already had. He thought some of them might do. The water wasn't out of my quarries at this time. He asked when I thought I could commence delivering stone, in case he wanted some. I said in about ten days.

The canal was late in opening that year, on account of finishing the cut, and quarrying was about two weeks later than usual. Johnson said I might go on and deliver some. I commenced getting ready. Got the teams down the canal. It required a large amount of mules—60 or 70 mules. As soon as this was arranged we commenced quarrying and delivering. He said he would use some stone from canal bank. I told him it would make him trouble; they would tumble to pieces. He thought it would do for backing. He asked me what it would cost. I told him I didn't know; I had never loaded that kind of stone with derricks. The stone was unfit; would have to make a piece. My foreman, Roebuck, told him, in my presence, the canal bank stone could be loaded easier in baskets than by derricks. The stone were burst in the center, and fell to pieces. Roebuck told him the stone would
82 not hold together long enough to be put on the boats. There the matter dropped. I never agreed to load any of this stone.

The canal bank stone, spoken of in the Farwell, Lake, and Walker agreement, is riffraff—loose stone—anything in the shape of a rock, without reference to quality. It is used for filling with—for heavy weights, instead of dirt. I never agreed with Mr. Johnson to deliver canal bank stone for any other purpose than riffraff. Navigation opened late that year. Johnson said I might go on and deliver some stone, and he would send his foreman, Hays, up to see if stone out of the canal bank couldn't be used for backing. The stone I was to deliver was the

same class and at the same price as in Farwell contract. I commenced delivering until May 12th, 1870, when stopped by receiving this telegram:

The Western Union Telegraph Company. Dated Henry, Ill., May 12th, 1870.

To EDWIN WALKER: I cannot receive any stone shipped from your quarry after this day. Have written particulars.

B. F. WELLS.

P'd.

I was loading boats for Henry for Willard Johnson on that day. I could not understand the telegram: did not know why it was sent. Concluded to unload the boats, but I turned the boats towards Chicago and loaded them with other kinds of stone. The dispatch alludes
83 to a letter which I received the day following. This is it:

HENRY, ILL., *May 12th*, 1870.

EDWIN WALKER, Esq.,
Lemont, Ill.:

DEAR SIR: My orders from Willard Johnson are, if you did not send stone from the canal-bank, that I must stop receiving stone from your quarry entirely. Last evening I received telegram from Mr Hays, our foreman, to the effect that there were no derricks put up for loading stone from canal-bank. I have extended the time several days later than Johnson gave me, but I can wait no longer. Therefore, I cannot receive any stone shipped from your quarry after this day, the 12th of may, 1870.

I have been inclined to give you all the time possible, and more than was allowed to me, for you to send stone from the canal-bank. It looks very much, indeed, as if you did not intend to ship any from that point. I must obey orders. I remain your true friend as ever.

Yours truly,

B. F. WELLS,
Agt for Willard Johnson.

I received no other letter from Wells written that day, or about that time. It had never been intimated to me that if I did not send stone from the canal-bank, Johnson would stop receiving stone from my quarry. I delivered no more stone to Johnson after receiving
84 that telegram, May 12. I next saw Johnson, after May 12th, about June 20th or 25. I went to Henry to get my pay. He talked about getting stone by rail. The water was low. He had asked me early in May—about the 4th or 5th—to find out the freight from Joliet to Henry, on the Rock Island Road. We went together, but the agent was not in. I went again, and failed. I told my agent to ascertain, and he did, and he wrote the letter of May 6, purporting to be signed by me and put in evidence by plaintiff. I never saw that letter before.

There are three kinds of stone composing the lock-wall—riffraff, vertical-wall, or heavy rubble dimension, or lock stone for facing and backing. Riffraff could be delivered on cars at Joliet for 1.25, vertical for $1.25 to $1.80 per cubic yard: dimension or lock stone $3. The difference is in the measurement. Riffraff would measure 130 to 150 yards

in a boat; dimension, lock, face, and backing would measure 55 to 65 yards per boat on account of its density. It would cost $3.00 to deliver on the cars at Joliet. I include the water transportation to Joliet from Lemont, the unloading at Joliet, and loading again. It would have to be loaded and unloaded by derrick. At $15 a car from Joliet, each car carrying five cubic yards, it would cost $6 from my quarry to Henry for the transportation alone. The dimension-stone at the quarry would be worth $4 to $5.

85 Dimension-stone could be carried from my quarry by boat to La Salle for $3 a yard; that includes delivering at La Salle without unloading, the unloading to be charged to the contractor. By the partnership agreement between Farwell, Lake, and myself the partnership was to pay the towage from La Salle to Henry.

I never agreed to deliver stone to Willard Johnson by railroad.

There was good water in the fall of 1869 to Nov. 1st, and in the spring until June. As to the fall of 1870, I think the water was low, but am not clear. The thing had left my mind. I have been in the stone business for 20 years. By the contract with the canal commissioners we had till June 1 or Sept. 1, 1871, to complete. Under the writing between me and Farwell and Lake, the supposition was that the work would be carried on as a whole, and it was not necessary that any particular kind of stone should go down faster than any other, unless it were to be a large amount of stone dressed, in case they might be wanted, which amounted to nothing so long as they were sent fast enough to have the work finished in time. It would take in the neighborhood of eighteen months to deliver the stone described in the Farwell, Lake, and Walker contract, so as to meet the canal contract. My recollection is, there was 23,000 yards of stone. It required a large amount of labor to get it out.

1,200 yards a month would be a very fair estimate. At the time

86 we were delivering about 2,500 yards a month. We could not deliver by river during the entire season. They reckon about five months out of the twelve for navigating the Illinois River. In fall of '69 we could have run down the whole season of navigation: in spring of 1869 about two months. They were late in opening the canal on account of the deepening. Was put to expense of unloading and taking off teams, by being stopped by letter and telegram of May 12th. We had established a line of teams, fifteen or sixteen, four mules to the team, 60 or 70 miles.

The stone I took out in the spring was the same as the fall before, backing, facing, vertical wall, and riffraff. It was classified by the engineer. The riffraff was from the canal-bank and passed toll free. I was never notified of any complaint of quality. The stone all went into one class or the other. In the spring of 1870 Mr Jenne called my attention to some top stone which had shell on it, and said it ought to be knocked off to save freights. This was about 1st of May. What was not sound would do for riffraff. I was not notified in any way that I must stop delivering unless the quality improved. No other reason was given me for stopping than that named in Wells' letter of May 12.

June 22d, 1870, I went to Henry for my pay for the May bill, and got it in full for all the stone I had delivered under the contract to William Johnson. I had previously got my pay for all stone delivered ex-

87 cept the 15% reserved under the canal contract, which I have never received. Had delivered in the fall before about $35,000 worth. I delivered no stone between the 12th of May and 22d of June. In June Johnson said he did not know but he should have to get stone on the railroad. He said Sauger and Steele offered to deliver them to him,

and he told me the prices, which were about equal to mine. He asked me if I could deliver some. I told him I should have to build a switch and put up derricks, and reload it, and of course could not deliver on the cars at Joliet at a less rate than I could at La Salle, on the canal-boats.

That is all that passed. I did not agree to deliver him any stone. I don't remember ever having seen the witness Smith until on this trial. I never in his presence agreed to deliver stone to Johnson by rail. I was not prepared to do so. Johnson never intimated that he thought he had any contract with me for stone. At the time he bought out he did not intimate he wanted stone of me. Six months afterwards he wanted me to commence delivering stone, but to no specified amount. There was no agreement with him to take stone from the canal-boat. He sent Alexander Hays up, and my foreman, Bushnell, saw him, but I did not. The stone on the canal-bank was taken out in the winters of 1865, 1866, 1867, 1868, and 1869. It was taken out in the winter so as not to obstruct navigation in the summer. It was en-
88 tirely worthless for anything but riffraff and cut filling. This was on account of the freezing of the moisture in the stone. It would burst in all directions, and, of course, was worthless for anything but small stone. It was never used for any other purpose.

It would take three months to get out 500 yards vertical stone with a derrick, and you'd have to move your derrick a hundred times. I don't see where they could get any vertical stone. Our experience shows we could not. I helped excavate the canal. If there were any there it would cost $3 a yard to get it out, if it could be done for that. It would take a week to get a boat-load. M'r Milne was at the quarry about first of May, and asked me if we were going to get out any stone for M'r Johnson. I told him we had an indefinite order from Johnson, and were going to commence delivery immediately. I was not at home when D. C. Hayes came there. I saw him there afterwards. He remained three or four days after I saw him. He said he expected M'r Johnson up. He said he sent him up to cut some stone, and didn't see any stone ready. I told him we could get him some stone, and asked him where Johnson was. He said he expected him. I had received no order from Johnson for stone. I asked Hayes what kind he wanted, and he said some stone for hollow quoins for the lock corners. Hayes did not say he had any orders, but said Johnson was coming up.
89 Johnson did not come up. I afterwards ascertained he came to Joliet and sent for Hayes from there. I don't remember anything about the three stones Hayes cut. He told me he had, but I don't know what they were. He had no orders to quarry any. My business was simply quarrying. I had no conveniences for cutting stone: had no place. I dealt in stone in the rough.

If any arrangement were made there should be a specific price for laying them down, reloading and rehandling twice, which would have to be paid. If M'r Johnson cut stone on my place he would have to have a space of ground to spread the stone outside of the quarry. Then after cutting they'd have to be reloaded afresh and put back to the place to be loaded on the boat. My contract with Farwell and Lake was simply to deliver stone in the rough. Hayes stayed two or three days after I first saw him. I told him I could give him stone but I should want to see M'r Johnson. I had nothing further to do with Hayes. I did not see Willard Johnson from the 22d of June, 1870, until the fall of 1873. In September, 1870, I received this letter from him:

HENRY, *Sept. 24, 1870.*

EDWIN WALKER, Esq.:

DEAR SIR: I sent M'r Hayes to your place expecting that you would have some stone quarried that he could set some cutters to work, but he returned, saying that you had not one piece. He will come up again Tuesday, and you must have a plenty of stone out so that
90 he may have plenty of work. These stone must be had promptly. The commissioners were here on his return, and were much disappointed that you had no stone quarried, as all of the stone for cutting must be got out this month. I will be there in the course of next week myself and look over the stone matter with you.

Yours, truly,

WILLARD JOHNSON.

He did not come up the next week as stated there. I never made any statement to Hayes that I would not or could not let Johnson have stone. I was always willing to help Johnson out. I told Hays if Johnson wanted any stone and was coming up I would be glad to furnish him. I don't remember Wells ever speaking to me about stone. As we open up a quarry we have to take it as it comes. This stone was all good. What did not fill one place would another. The stone delivered to Johnson was delivered as it came. Did not distinguish between that I delivered to Johnson and what to anybody else. Wells never told me the engineer had told him to stop the delivery of any more of that stone. I saw M'r Jenne there a few days before the 12th of May, and he appeared to be very well satisfied I was getting down to better rock.

This is the first time I ever heard any objection to the quality of my stone. It is actually the best stone in the market beyond any question of doubt. 85 per cent., and I think 90, of that kind of stone
91 used in Chicago comes from these quarries. It is known as the Lemont stone. The only quarries of the kind in the country; used for all building purposes—facing, vertical, foundation—all kinds.

I never entered into any agreement with Mr. Johnson in the summer of 1870. I expected to see him when Hayes came up, but he never put in an appearance, and I did not see him that year after our meeting at Henry. After the 12th of May, Johnson did not notify me to deliver stone nor make any claim on the basis of having a contract with me for stone. When I was paid in June, no objection was made on account of quality or because I had not gone on after May 12. I might have delivered stone by water for five weeks, and probably six after May 12.

No writing or written memorandum of any kind in relation to a contract passed between me and Willard Johnson at any time. I made no written agreement at any time in reference to the delivery of stone. Johnson said he would take stone from me if he couldn't do better anywhere else, and I agreed if he wanted my stone to sell them to him, and if not, it didn't make any difference. He said he'd take my stone if he couldn't do better. This was in November, 1869. In the spring he told me I might commence and deliver some, but he said nothing at all about delivering the stone specified in the Farwell agreement. There was no specified time of delivery spoken about. As to price, it was
92 stated in the fall it was to be the same as in the Farwell agreement. Nothing said about price in the spring.

Cross-examination:

Johnson bought us out and took everything in hand. Made no positive agreement in the fall. He never notified me he'd take any stone.

The conversation in the spring was before I began delivery. It was in April, not May. No reference to price or quality, or the original contract at that time. Johnson requested me to commence delivering stone according to Farwell agreement until further notice. I commenced, and delivered until May 12th. There was a difficulty about measurement. I objected; Jenne did not measure sufficient quantity. It made no difference as between facing and backing, but to reduce backing to riffraff, did. I objected to Mr Wells in May.

The cost of quarrying vertical stone in my quarry is about a dollar a yard. The cost, of transportation to Henry about 1.80 to 1.90. The tolls on vertical were from six to eight mills a mile. A boat will carry more vertical than dimension, because not so compact. I never agreed or had any arrangement with Johnson to furnish stone from the canal-bank; fixed no price at which boats could be loaded. It would be new business to me, and I can't recall a record from which to fix a price. Made no offer for that in May. That letter (letter shown him of April
93 13th, 1871) is in my book-keeper, Brazell's, handwriting. This letter (here another letter is shown him, dated May 10th, 1870) is in my foreman, Tomlinson's, handwriting. This telegram (telegram shown him, dated May 10th 1870) was sent by my orders. The letter of April 13th was probably in reply to one from Wells about the canal-bank. The $65 is for loading the boat with riffraff. Would not have loaded vertical stone at that. The riffraff I furnished the work came from the canal-bank as per the Farwell and Lake agreement. The riffraff at $65 per boat is about the same price. Loading it would come to about $65 or $70. Transportation $12 to $14 per day.

I never considered I had a contract with Johnson. It was merely an order for stone to an indefinite amount. It was not a contract. It was an agreement. The stone was of a specific quality for a specific purpose, and at a specific price, but no specified quantity. I was to go on until stopped. Would have furnished enough for five locks if paid for it. Was to furnish all he required. I continued up to May 12th, when I received the dispatch and abandoned the agreement, because I had no other alternative, and never resumed it or promised to resume it. Did not see Jenne after May 12th, to my recollection. Never agreed with Johnson that I would furnish stone after that.

I did not reply to the letter of Sept. 2d, because it was not necessary. It explained that he was coming up to see me. The letter was a surprise to me—greatly surprised. I expressed myself to my fore-
94 man, Tomlinson, to that effect. I thought Johnson was a very peculiar sort of a man. There was an agreement subsisting between us that I should furnish stone. There was told at Henry in June about sending stone by railroad, but no agreement by me. I could have delivered all the stone required for this work in fifteen or eighteen months from the time the contract was originally made. It might have been done within that time by going to extraordinary expense, but not very well.

Under the Farwell contract I was to deliver the stone as required, as soon as it could be done on the canal. Was furnishing stone in 1870 for the crib in Chicago and State work. The State paid a little better price than Mr Johnson, but the stone was not much better. Not very large contracts; not so large as this. I delivered some stone for Rock Island. Had no contract for delivery at Rock Island. We don't deliver stone on the railroad. I had a small contract to load some stone at the cars for the Rock Island arsenal.

I do not deny interviews with Johnson, but I deny having entered into any agreement after May 12th, 1870, for the delivery of stone.

Redirect:

I deny that in the presence of Wells Johnson, j'r, Johnson, or Smith, I ever agreed to deliver any stone whatever by rail. I talked with Johnson about it, and went at his request to ascertain freights, but I never agreed to deliver any stone except by water. When Jenne was
95 there, May 3d, he called my attention to what we call the "top lift," on which there was a shell that he said should be knocked off to save the freight. It could be charged for riffraff or material, but not for face. I deny I was informed the stone would not be accepted at all. I had contracts in 1870, as I have stated. They were simply orders from day to day for so many cubic yards or feet of different kinds of stone. There might have been a larger profit on these than on this lock, but there was a fair profit on this, and those orders did not interfere with the fulfilment of this.

I could have delivered the stone under the Farwell contract, and there was a profit in it. The letter of April 13th, shown me on cross-examination, was written in 1871, and is so dated. I was questioned as if it were in 1870. The round trip from Lemont to Henry and return averages about seven days. The boats carry from 120 to 140 yards of riffraff, and at 65c. for loading each boat, fr. 12c. to 13c. per day for the boat, there's a large profit in delivering riffraff at $1.40 per yard. This letter related to riffraff. I did not know what Johnson might do with it. He might classify and call it what he chose. We call it riffraff. The letter had no connection with the previous agreement. Counsel for def't here read the letter of April 13th, 1871, which is as follows:

96 LEMONT, *April* 13, 1871.

B. F. WELLS, Esq.

DEAR SIR: Your favor of the 11th inst. is to hand.

I will not be able to furnish you with my own boats. But I will hire boats for you at a cost of from $12.00 to 13.00 dollars per day, and supply you with spoil bank stone, loaded on boat, at sixty-five dollars per boat, you to pay your own boat and team hire. Hoping to hear from you again soon,

Yours, respectfully,

EDWIN WALKER.

97 The dispatch and letter of May 10th, 1870, was sent under these circumstances: My foreman, Tomlinson, who had charge of quarrying the stone, called my attention to the returns from Henry. I examined and found they were measuring less than the real measurement. I sat down and wrote the dispatch, and Tomlinson the letter, and they were sent to Wells. They are as follows:

98 LEMONT, *May* 10, 1870.

B. F. WELLS, *Superintendent, Henry, Ill.:*

Who is measuring my stone? It is not properly done. See to it.

E. WALKER.

LEMONT, *May* 10, 1870.

B. F. WELLS, Esq., *Superintendent, Henry, Ill.:*

DEAR SIR: I telegraphed you to-day in reference to stone. The last boat-loads are reported short. What is the matter? I have sent no

stone but what will go in under the contract somewhere. Please ascertain and let me know.

E. WALKER.

99 Tomlinson handed me Johnson's letter of Sept. 2d at the railroad when I came home at night.

(The def't's counsel propounded the question, "Why were you surprised?" To which pl'ff, by his counsel, objected, and the court sustained the objection and refused to allow the question to be put, and def't, by his counsel, then and there excepted.)

In the fall of 1869 we had delivered 5,112 yards of riffraff, 3,079 yards dimension or lock stone, 994 yards vertical wall; dimension covers backing and face, which was the same price. We delivered as it came from the quarry. In the spring we had delivered, I think, about 1,200 to 1,400 yards in about the same proportion, though I think only one or two boats of riffraff, which was about fall. It was lock and vertical.

Recross:

Quarrying vertical is worth about $1 a yard, including the stone. At the quarry we'd sell it taken out for about $1.50; transportation, about 1.90; that is, 2.90. Tolls were a little less than 30 cents per yard. The canal is 74 miles to the quarry. I settled with Johnson, received my pay, and receipted June 22d, on the engineer's estimates.

D. C. Jenne recalled by the court.

Out of dimension-stone we used the poorer quality for backing. We selected those adapted for face stone, which were required to be
100 of certain dimensions by the specifications, and used the rest for backing.

CHARLES FITZSIMONS.

Contractor for public works. Practical stone-mason and stone-cutter for thirteen years. Acquainted with the stone upon the canal-bank. Excavated part of three sections in the deepening—two in winter, one in summer. Blasted out. I used in 1867–'8, and '9, 23,000 cords of riffraff from the canal-bank. Canal bank stone is classed as riffraff, no more, 4 yards to a cord. I never found any stone there fit for anything but riffraff. Much of it not fit for that. What was quarried in the winter, exposure to the frost destroyed, so that it broke up. What I quarried in the summer, the powder destroyed, the prism of the canal was so narrow, and left it unfit for masonry.

Edwin Walker recalled.

I was subjected to a loss, in the withdrawal of my boats and teams by being stopped May 12th, of in the neighborhood of $8,000. It threw 65 to 70 mules on my hands. I had to buy a farm to keep them on and had to dispose of them as I could. I had boats of my own, and it took all the spare boats on the canal and raised the price, and I had to get boats at high prices in order to deliver the stone by water fast enough to be out of danger. My teams were useless so far as profits were concerned. But as to the question of damage I never supposed I had
101 any claim on Johnson for any damage. Never supposed I was bound to him or he to me, one way or the other.

ALFRED ROEBUCK.

Have been engaged in quarrying for 16 years. Was foreman in loading boats for Edwin Walker in 1870.

In 1868 & '69 I was employed in excavating two sections on the canal. It was in winter. We drilled and blasted. The stone on the canal-bank in the spring of 1870 were small. Some were of pretty fair size, but lit up by the frost. Good for riffraff, what was large enough, and nothing else. Vertical stone could not have been got from the canal-bank. There might have been a little there but it would cost more to get it out than it would come to. Know about stone delivered to Johnson. I loaded at the quarry. Regular trip from Lemont to Henry and return was about six to seven days.

On the 12th of May, 1870, I was loading boats for Henry. A dispatch came for us to stop. Went to M'r Walker and asked him what we should do. Unloaded the boats and turned them to Chicago. Alexander Hays came to Lemont last of April or 1st of May. He came to see if he could get some dimension-stone from the canal-bank. I went down to the canal-bank with him. He said he couldn't see any it would pay to get out and load. I couldn't. He said he didn't know what they would do with it when they got it down. He was not there at
102 any other time to my knowledge, and I would have been likely to have seen him if he had been there. He said he would go back and tell Johnson or Wells how it was. We were delivering stone at the time. I remember distinctly unloading the boats on the 12th of May.

The water kept up, the spring of 1870, to last of June or 1st of July. There was a rise in November.

Cross-examination:

We could have got stone enough to complete the lock delivered in 1870 with what we had delivered in 1869. I think we ran boats until Dec. 1st, 1870, and could have delivered in November. With the stone delivered in 1869, and down to July, 1870, and in November, we could not have got all the stone down to Henry, but out of the quarry.

JOHN TOMLINSON.

Was superintendent of Walker's quarries in the spring of 1870. In his employment from 1864 to 1872. Was superintendent throughout summer and fall of 1870. Recollect the despatch and letter of May 12, 1870. I identify them. We were loading boats at the quarry for Henry when the despatch came. We unloaded them. The letter of May 10th is in the handwriting of one of our clerks. I called Walker's attention that day, or one or two days previously, to the fact that the receipts came back changed in the measurement. I remember Alexander Hays coming to the quarry in connection with examining the canal-bank for stone. He went with Rockwell to look at it. It was good for
103 filling cuts. It was all burst to pieces by the frost. It was not good for vertical wall.

I remember Alexander Hays' son, the witness, coming to the quarry the last of August or early in September. M'r Walker was not there when he came. I saw him. There were three stone lying by the Alton and St Louis Railroad, intended for the St Louis market. I told him he might start on them. He said he came up from Henry to cut stone, and I let him go to work on them. He had no documents, nothing in the shape of a letter, that he was sent to cut stone. I was led to infer he was sent by Johnson. I set him to work to get him employed. I did not like to see idle men lying there. We had been furnishing stone for the lock, and I didn't know but we would have to quarry some for him. I had received no instructions from M'r Walker from the 12th of May to that time to quarry stone for Johnson. This man came without written directions, and Walker had given me none.

Hays was around a week or more. Walker came that night or next day; can't recollect positively. He was about three or four days at a time. Think Hays went to Walker's house. I was there when Johnson's letter of Sept. 2 came. I received it about noon. Walker was not there. I kept it until night and met Walker at the train and showed it to him. No other letter had been received from Johnson since May 12th. I opened all letters that came, except those I thought related to his own private business. I remember no other letter from May 12th from Johnson. When Walker read the letter he expressed surprise.

J. K. LAKE.

Stone contractor. Canal-bank stone was only fit for filling cribs or slope-wall stone; riffraff.

C. E. CARTER.

Civil engineer for 18 years. Was employed on the canal, doing its deepening, from 1865 to 1871. Most of the canal bank stone was taken out in winter; blasted out principally; almost entirely. It was more or less cracked by the use of gunpowder. Stone taken out in the winter is usually cracked by the frost. After remaining a year or two it might be presumed it would remain whole longer. The canal-bank stone is not much of good quality. If there was very good it would be merely accidental. The great mass would be riffraff. There might be a little good dimension or vertical.

The pl'ff, in rebuttal, introduced the following evidence:

D. C. Hays recalled.

The three stone were drawn out while I was there, and after I requested stone. Tomlinson told me to get them. I saw Walker the evening of the day I got there. Had no written paper or order for stone. Johnson said he would be up before a great while. Johnson passed through on the train from Chicago. I met him at the train by appointment. He wrote me to meet him. He stepped on to the platform. He did not see Walker or any of his foremen, but went on to Joliet. From the time I went to Lemont until I went away with him then, he had not been there. I came back from Joliet the same day and returned there the next and stayed a week. Didn't tell Walker I was going to Joliet, nor Thomlinson. Didn't tell them I had had a letter from Johnson. Think I wrote or telegraphed Johnson they were not furnishing me stone. Told Johnson so when I saw him. When we got to Joliet, Johnson, Sanger, and I went to Sanger's quarry and examined it.

D. C. JENNE:

Examined the canal-banks with Mr Wells, to see if there was any that would do for vertical walls. Saw some that would do, mixed in with the other stone. Made no estimate of proportions or the cost of getting it out. If any stone had been taken out I should have examined it at Henry to see whether it would do, and estimated it at Henry. This was in the spring of 1870. I went at the contractor's request to see if there was any that would do, but made no estimate of how many or what it would cost to take them out.

This was all the evidence in the case, and arguments of counsel hav-

ing been had, the defendant, by his counsel, asked the court to instruct the jury, as follows:

"That if a verbal agreement was made in November, 1869, by which defendant agreed with the plaintiff to carry out the Farwell, Lake,
106 and Walker agreement, so far as relates to the delivery of the stone, as therein specified, and such agreement between plaintiff and defendant was not in writing, and signed by defendant, or any person or persons duly thereto authorized for him, and no memorandum or note thereof in writing was made and signed by defendant, or some person or persons duly authorized for him, then such agreement is within the statute of frauds and void, if it appear from the Farwell, Lake, and Walker contract that it was not the intention and understanding of the parties that the same should be performed by the defendant within the space of one year from the making of the verbal agreement between pl'ff and defendant.

"That this is also the law if the supposed verbal agreement was made in April, 1870, and it was not the understanding and agreement that it was to be performed within a year thereafter.

"Mere physical possibility of performance of an agreement within a year does not take it out of the statute. The question of performance depends upon what the intention and understanding of the parties to the agreement was in regard to it."

But the court refused to so instruct the jury. To which refusal of the court to give said requested instructions, or any or either of them, the defendant, by his counsel, then and there, and before the jury had retired, duly excepted.

The court charged the jury as follows:

107 The defendant insists, by way of defence—

First. That he never made a contract with the plaintiff for the delivery of the stone.

Second. That the same, if made, was not to be performed within one year from the making thereof, and was therefore void under the statute of frauds of this State.

Third. That the plaintiff, without any legal or valid reason, terminated the said contract by his own act, and discharged the defendant from the further performance thereof, while the defendant was in the act of performing the same.

Fourth. That the plaintiff did not, in fact, sustain any such amount of damages as is claimed.

Whether there was such a contract made between the parties as is claimed by the plaintiff is a matter of fact to be determined by the jury from all the evidence in the case.

The evidence is quite contradictory and conflicting, and it is your province to weigh the evidence and determine therefrom whether a contract was made between the parties, as is set forth in the plaintiff's declaration.

There are certain undisputed facts in the case which it will be proper for you to keep in mind in attempting to arrive at your conclusion in the premises.

It is admitted that in the month of August, 1869, the defendant, C. B. Farwell, and J. K. Lake, entered into a contract with the State of
108 Illinois for the construction of the lock and dam in question: that the defendant agreed in writing to furnish and deliver on board canal-boats at Henry all the stone required for the completion of

said contract, which were to be paid for by the contractors at the prices I have named (being the same prices which the plaintiff claims he was to pay the defendant); that the plaintiff bought out Farwell and Lake's and the defendant's interest in the said contract, and by consent of the proper officers of the State succeeded to all of their rights as contractors for said work, and agreed to assume all contracts which Farwell, Lake, and the defendant had made for materials to be used in said work.

That the contract held by Lake and Farwell, or one of them, with the defendant for the stone was delivered to the plaintiff, but not assigned in writing to him, and that the defendant verbally told the plaintiff that he could have the benefit of the said contract for the stone if he, the plaintiff, should elect so to do. That soon after this stone contract was made by the defendant with his partners, Farwell and Lake, he commenced performing the same, and had before the assignment to plaintiff delivered at Henry nearly nine thousand yards of said stone.

It is also admitted or conceded that the defendant, in the spring of 1870, delivered to the plaintiff at Henry a quantity of stone,
109 which was estimated and paid for at the rates called for by the Farwell and Lake contract. The plaintiff has given not only his own testimony, but that of others, tending to show that defendant agreed to go on and perform the said contract for the delivery of stone, while the defendant denies that he ever agreed with the plaintiff to fulfil said contract. As this testimony is conflicting, it is for you to say where the preponderance lies. The plaintiff has the laboring oar, and is bound to make his case by a fair preponderance of testimony, and to make it out substantially as charged.

You are to judge of the credibility of the witnesses, and, in cases of contradiction, determine from all the circumstances under which the witnesses have testified, and all the surrounding influences which apparently would influence their testimony, who you will believe. The most of the plaintiff's testimony on this branch of the case, that is, whether there was in fact a contract between the parties for the delivery of this stone by the defendant, tends to show a parole or verbal promise by the defendant to the plaintiff to fulfil or complete for the plaintiff the written contract he had made with Farwell and Lake; that is to say, you are referred by the plaintiff's testimony to the contract between the defendant and Farwell and Lake to ascertain what defend-
ant undertook to do for the plaintiff. You get no details as to
110 prices, qualities, time or place, and mode of delivery, except by reference to the written contract. The defendant, assuming that all the evidence in the case, if it proves anything for the plaintiff, only proves that the defendant verbally agreed with the plaintiff to deliver the stone upon the terms and in the manner provided by the original written contract with Farwell and Lake, insists that this proof, at most, only shows a parole or verbal agreement between the plaintiff and defendant, although referred to the written contract for some, or, in fact, most of its terms, and that therefore the contract is only a contract by parole as between the parties to this suit.

And the court charges you that, from the proof in this case, you must find that the contract between the parties, if made at all, of which you are the judges, was and is a verbal or parole contract.

The plaintiff claims that, by the agreement made with the defendant in the spring or summer of 1870, the defendant agreed to deliver by rail. It was competent for the parties to change the contract in that regard if they chose to do so.

It is for you to say whether it was agreed to so change the mode of

delivery or not, and unless the evidence satisfies you that the defendant did agree to change the mode of delivery and to deliver by rail then the defendant would be entitled and required to deliver by canal-boats, as specified in the original contract. The delivery by rail
111 would be but a modification of the original contract, and such a modification as the parties might make as the contract progressed, by reason of any exigency which should arise. If he did agree to deliver by rail, then such agreement was binding according to its terms, as shown by the evidence: that is, you must ascertain from the proof what the defendant did agree to do, if anything, in the way of delivering by rail; and he is bound by such agreement as you shall find from the proof made, if any.

(To the foregoing portion of said charge referring to a change or modification of said alleged contract the defendant, by his counsel, then and there, and before the jury had retired, duly excepted.)

The defendant insists that the agreement between the parties, if made at all, was an agreement not to be performed within one year from the making thereof, and is therefore void by the statute of frauds, which statute is as follows:

"No suit shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge defendant upon any special promise to answer for the debt, default, or miscarriage of any other person, or to charge any person upon any agreement made in consideration of any marriage, or upon any contract for the sale of lands, tene-
112 ments, hereditaments, or in any other matter concerning them for a longer term than one year, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party charged therewith, or some other person by him legally authorized."

The point made by counsel is that this contract comes within the last clause of the section which I have read; that is, that it is an agreement not to be performed within one year, and is therefore void under the statute.

It is not pretended that there was any express clause in the original contract between the defendants, Farwell and Lake, by which the time for the performance of that contract was definitely fixed. The language is that the stone are to be delivered "as required for the work." Nor is it pretended that by the verbal contract between the defendant and the plaintiff any time of performance was defined or fixed, but defendant insists that as the contractors with the State had more than one year from the making of this contract in which to complete the lock and dam, and as the defendant was only to deliver the materials as wanted for the work, therefore more than one year was intended between the parties as the time for the completion of the stone contract; and that,
as plaintiff at most only claims that defendant agreed with him
113 to deliver the stone to plaintiff on the same terms and in the same manner he had agreed to do for Farwell & Lake, they must necessarily have intended that the contract was not to be performed within a year.

I do not think this reasoning is sound. The fact that the dam and lock were not, by the contract with the State, to be completed before June or September, 1871, did not preclude the contractors from completing it at an earlier day if they saw fit, nor did it preclude them from selling

upon defendant for this stone as fast as they wanted it for the purpose of pushing on the work.

I find nothing in the contract with the State, nor in the contract between the defendant, Farwell & Lake, which prevented the contracting parties in the original contract from completing the contract at an earlier day than that limited in the said State contract.

If the contract by its terms is not to be performed within a year, then of course there would be no doubt about the application of the statute. If it said in so many words that it is not to be performed within a term beyond a year from the time of making the contract, it must obviously be considered within the provisions of the statute. If the contract, from a fair construction of all the clauses and the provisions, when taken together, shows manifestly that it was not intended that it should
111 be performed within a year, then the contract would be considered as within the statute; but you must explore only the contract itself. You cannot go outside of the contract for the purpose of determining that question. The contract between these parties being a parole contract, however, you must take it, and all that the parties say about the contract, for the purpose of determining this question and determining what they intended and meant by it.

Here, however, the aspect of the question presented to us is a written contract made between certain parties, and which it is claimed the defendant agreed with the plaintiff that he would perform, and the question is, when did he intend or agree to perform it. If the contract is such that either party may insist upon its performance within a year, and place the other in default if not performed, then the contract is not within the statute. This I lay down as a general rule, and as a fair test by which to determine the question of whether this contract was within the statute or not.

If you find from the evidence in this case that while there was no specific time fixed by the terms of the contract or fairly deducible from it for its performance, yet it was of such a nature that it might have been performed within a year; that is, if either party could have insisted upon
its performance within a year, then the statute does not apply.
115 It is not a question whether it is probable or improbable that all this stone would not have been required by the plaintiff for the completion of this work within a year. That would involve a consideration of circumstances and contingencies with which we have nothing to do. But if the plaintiff had concluded to press his work with such vigor and rapidity as to require all the stone from the defendant during the year, had he a right under this contract to do so? That is a fair test. The contract of the defendant with Farwell and Lake binds the defendant to deliver the stone as the same may be required "in the progress of said work." So that the rapidity of the progress of the work is the measure of the rapidity with which the defendant is to deliver the stone; and if you are satisfied from the evidence that the defendant agreed with the plaintiff to deliver this stone in the same manner which he had agreed with Farwell and Lake to deliver them, and that such contract was one which might have been required to be performed within year at the plaintiff's option, then said contract is not within the statute.

The fact that the defendant had, within a few months after the contract with the State was made, delivered almost half of this stone, is of importance as tending to show that the work could have been fully performed by the defendant within a year from the time that the
116 plaintiff and defendant made their contract, if you find that one was made.

(To the foregoing portion of said charge relating to the application of the statute of frauds to the alleged contract, the defendant by his counsel then and there, and before the jury had retired, duly excepted.)

The plaintiff's evidence tends to show that the defendant agreed with the plaintiff to deliver this stone in pursuance of the old contract with Farwell and Lake some time in November, 1869, with perhaps the modification in regard to the delivery by rail which it is claimed was made in the spring, and the testimony on the part of the defendant tends to show that he had no such understanding or agreement with the plaintiff that fall on the subject of delivering the stone, but that he did have a conversation and partial contract with the plaintiff in the latter part of April, 1870. It is for you to say, in the light of all the testimony, when the minds of the parties met upon the subject-matter of the performance of the old contract, if ever they did meet. Was it in the fall, as the plaintiff has testified, or in the spring, at the time the defendant says he agreed to commence delivering stone? If you should come to the conclusion from the testimony that the defendant did undertake to deliver the stone as contended for by the plaintiff, and that the contract might have been performed within a year, it will be your duty to consider in the light of the evidence the point made by the defend-
117 ant that the plaintiff forbade the further performance of the contract when the defendant was ready to perform and in the act of performing.

The evidence on the part of the defence rests on the telegram and letters of Wells to the defendant, directing the defendant to stop delivering, or importing such a direction.

The plaintiff claims to avoid the effect of this by proof tending to show that the defendant, after the order to stop, promised to perform the contract, and so conducted himself as to lead the plaintiff to believe that he intended to comply with the contract; in fact, that both parties waived the stoppage or suspension of performance indicated by Wells' letter and telegram, and acknowledged the contract as still in force and binding upon the parties.

If the testimony satisfies you that the defendant did, after the notice of the 12th of May, recognize the contract as still in force, and promise the plaintiff that he would go on and complete the same, the defendant cannot now claim as a defence to this action that said notice released him from the performance of the contract.

If, on the contrary, you are satisfied that the defendant made no agreement after the notice to stop on the 12th of May, recognizing the contract as still in force, or promising to perform it, or continue
118 it in force, then the defence may be considered made out, although the notice to suspend might entitle the defendant to damages; but I do not think it is necessary to discuss the question of the defendant's damages.

The defendant's claim is, that even if any such contract as contended for by the plaintiff was made, the plaintiff stopped the performance of it by his own act, and that the defendant is entitled to damages by reason of such stoppage. Such a position might, perhaps, be sound and allowed in this case if the proof sustained the position taken by counsel. But I think, in order to make out a claim for damages on the part of the defendant, growing out of the stoppage, he should have followed up the proof by showing that the defendant, on being notified to stop, offered to go on, and was ready and willing to have gone on and completed the contract, and as there is no pretense that any such offer was made immediately upon the direction to stop, I don't think that any claim for damages

can be considered by the jury, especially if you find the defendant afterwards recognized the contract as in force, and agreed to go on and fulfil it either as originally made or as modified so as to require delivery of said stone by rail.

(To the foregoing portion of said charge the defendant, by his counsel, then and there, and before the jury had retired, duly excepted.)

119 The remainder of the charge related to the question of damages only, and is, therefore, omitted.

The defendant also asked the court to give to the jury the following instruction:

"That verbal admissions, while if deliberately made and precisely identified they frequently furnish satisfactory evidence, are to be received with great caution, and the attention of the jury should be directed in passing upon alleged verbal admissions to whether the witnesses testifying thereto distinctly understood the party charged in what he said, and whether they have or have not intentionally or unintentionally failed to express what was actually said." But the court refused said instruction.

To which refusal of the court to give said instruction the defendant then and there, and before the jury had retired, duly excepted.

The jury having found a verdict in favor of the plaintiff, the defendant entered a motion to set aside the verdict, and for a new trial, and assigned the following grounds, which said motion is set out on pages 39 and 47.

And said motion coming on to be heard on the 27th day of January, A. D. 1875, was overruled and denied.

To which decision and ruling of the court in overruling said

120 motion, and in entering judgment upon the verdict, the defendant, by his counsel, then and there duly excepted; and inasmuch as the foregoing matters and things do not appear of record in said cause, the defendant prays that this his bill of exceptions may be signed, sealed, and made part of the record in said cause, which is done.

[SEAL.] H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Jan'y 27, 1875. W'm H. Bradley, cl'k.

Appeal bond.

Afterwards, to wit, on the 6th day of February, A. D. 1875, said defendant filed in said clerk's office his bond in appeal in said entitled cause; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Edwin Walker, John A. Lomax, and John Atkinson, all of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto Willard Johnson, of Fulton County, State of New York, in the full and just sum of eleven thousand dollars, to be paid to the said Willard Johnson, his executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly

121 and severally, firmly by these presents, sealed with our seals and dated this sixth day of February, in the year of our Lord one thousand eight hundred and seventy five.

Whereas lately at a term of the circuit court of the United States for the northern district of Illinois, begun and holden on the first Monday of December, A. D. 1874, in a suit depending in said court between the said Willard Johnson, plaintiff, and the said Edwin Walker, defendant,

judgment for six thousand five hundred dollars damages and costs of suit was rendered against the said Edwin Walker; and the said Edwin Walker having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Willard Johnson citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Edwin Walker shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

EDWIN WALKER. [SEAL.]
JOHN A. LOMAX. [SEAL.]
JOHN ATKINSON. [SEAL.]

122 Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed Feb'y 6th, 1875. W'm H. Bradley, clerk.

Stipulation.

And afterwards, to wit, on the 25th day of August, A. D. 1875, the said parties, by their attorneys, filed in said clerk's office their stipulation in said-exhibited-cause; which said stipulation is in the words and figures following, to wit:

United States circuit court, nor. district of Illinois.

WILLARD JOHNSON }
v. }
EDWIN WALKER. }

It is hereby agreed that the amended declaration and amendments to the declaration filed Nov. 27th, 1874, shall be considered and treated as if filed Nov. 9, '74, and the pleas filed Nov. 9 shall be considered as pleaded to said above-named amendments as well as the declarations and amendments filed before. And the filing of replications to the deft's special pleas is waived, the pl'ff taking the same benefit as if the facts therein alleged were denied by replication, and that all
123 pleadings shall be regarded as having been filed in due time.

FULLER & SMITH,
Atty's for Def't.
WILLIAMS & THOMPSON,
Atty's for Pl'ff.

(Endorsed:) Filed August 25th, 1875. W'm H. Bradley, cl'k.

124 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in the cause wherein Willard Johnson is the plaintiff and Edwin Walker is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 13th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

125 UNITED STATES OF AMERICA, *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Willard Johnson, plaintiff, and Edwin Walker, defendant, a manifest error hath happened, to the great damage of the said Edwin Walker, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States
126 should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 99th year.

[SEAL.] WM H. BRADLEY, *Clerk.*

(Indorsed:) In circuit court of the United States, northern district of Illinois. Edwin Walker, plaintiff in error, vs. Willard Johnson, defendant in error. Writ of error.

127 The United States of America to Willard Johnson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Edwin Walker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry W. Blodgett, judge of the district court of the United States, and sitting as judge of the circuit court of the United States in and for said northern district of Illinois, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] H. W. BLODGETT, *Judge.*

128 Received a copy of the within citation this sixth day of February, A. D. 1875.

WILLIAMS & THOMPSON,
Att'ys for Willard Johnson, Def't in Error.

(Indorsed:) U. S. Sup. Court. Edwin Walker, pl'f in error, vs. Willard Johnson, def't in error. Citation.

(Indorsement on cover:) No. 249. Edwin Walker, plaintiff in error, vs. Willard Johnson. N. Illinois C. C. U. S. Filed 18 October, 1875.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1877.

EDWIN WALKER,
Plaintiff in Error,

vs. No. 249.

WILLARD JOHNSON,
Def't in Error.

STATEMENT OF FACTS, ASSIGNMENT OF ERRORS, AND ARGUMENT FOR PLAINTIFF IN ERROR.

MELVILLE W. FULLER,
Of Counsel for Plaintiff in Error.

CHICAGO:
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1878.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1877.

EDWIN WALKER,
Plaintiff in Error,

vs. No. 249.

WILLARD JOHNSON,
Def't in Error.

STATEMENT OF FACTS, ASSIGNMENT OF ERRORS, AND ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE YOUR HONORS:

This was an action of assumpsit brought by Johnson, defendant in error, against Walker, plaintiff in error, to recover damages for breach of an alleged contract.

To a proper understanding of the case, a

STATEMENT OF THE PLEADINGS

seems necessary.

The declaration, filed Dec. 2, 1872, contained the common counts for goods, wares, and merchandise, money loaned and advanced, had and received, etc., (Record, pp. 2, 3, 4,) to which the general issue was pleaded.

Subsequently additional special counts were filed, as follows:

First: Averring that the plaintiff below, Johnson, upon the 6th day of November, 1869, entered upon the performance of a certain contract between himself and the Illinois Canal Commissioners for building and constructing a dam and lock near Henry, in Illinois, for the improvement of the Illinois river, said dam and lock to be built and constructed *in great part of stone*.

That the defendant below, Walker, at the same time entered into a contract and agreement with Johnson, in and by which he agreed to furnish Johnson all the stone which should be required for the construction of said dam and lock, to be delivered to Johnson on board of canal boats at Henry, as the same should be required in the progress of said work of constructing said dam and lock, said stone to be of the form, description and dimensions required for said work; the quantity to be ascertained from estimates made by the engineer in charge of the construction. (Printed Record, p. 5.)

That, in consideration of Walker's said agreement, Johnson promised to pay Walker certain designated prices.

That Johnson entered upon the construction of the dam and lock, relying upon the agreement with Walker, and on the 1st day of July, 1870, and afterwards, notified Walker that stone was required and what, and demanded of Walker the delivery "in accordance with the terms of said contract and agreement."

That Walker neglected to deliver, and Johnson was obliged to pay more for other stone, and more for cutting it.

Second: That Jan. 1st, 1870, Johnson being engaged in the construction of the dam and lock, bargained with Walker to buy, and Walker contracted and agreed to

deliver to Johnson, all the stone required to construct the dam and lock, on board of canal boats at Henry, from time to time, and as the same should be required in said work of building said dam and lock, and Johnson agreed to pay, &c. That Walker failed to deliver upon request, and Johnson was damnified. (P. Rec. p. 6.)

Third: That Nov. 6th, 1869, Johnson being engaged in the construction of the dam and lock, under a contract with the canal commissioners, bargained for and agreed to buy of Walker all the stone required, to be delivered at Henry on canal boats, as the same should be required in the work of construction, "and during the season of A. D. 1870," at certain designated prices, but in August, Walker failed upon to demand to do so, and Johnson was thereby injured. (P. Rec. p. 7.)

Fourth: That Feb. 1, 1870, Johnson contracted and agreed with Walker to buy and purchase of him *all the stone* required for the building of the dam and lock which Johnson was engaged in building, under a contract with the Canal Commissioners, and to pay, etc., and Walker agreed to deliver at Henry, on canal boats, and that Walker failed to deliver in Sept., 1870, and so Johnson was damaged. (P. Rec. pp. 8, 9.)

Fifth: That Jan. 1, 1870, Johnson being engaged in building the dam and lock, bargained to buy the stone of Walker, and Walker contracted and agreed to deliver it on board of canal boats at Henry, as the same should be required, and Johnson agreed to pay, etc.

That June 1, 1870, *in consideration of Johnson's promises and undertakings*, and that the waters of the Illinois were low, and navigation difficult, Walker agreed to, and with Johnson, "that *if, by reason of said low water* in said river, he could not deliver said face stone by canal boat as aforesaid, he would send the same by railroad, and deliver the same at Henry aforesaid on cars." That in

Aug., 1870, Walker failed upon demand to deliver, etc. (P. Rec. pp. 10, 11).

Sixth: That Feb. 1, 1870, Johnson was engaged in building the dam and lock under contract with the Canal Commissioners, and Walker contracted and agreed to deliver the stone in canal boats, and on July, 1, 1870, agreed that if, by reason of low water, he could not deliver by boat, he would by rail, and that he failed to do so. (P. Rec. pp. 12, 13).

Seventh: That May 28th, 1870, Walker entered into a contract and agreement with Johnson to deliver at Henry, all the stone for the dam and lock, and failed to do so. (P. Rec. pp. 18, 19).

Pleas—1st, Gen. issue. 2d, That the contract and agreement set forth in the declaration, and the only contract, was made and entered into prior to May 12, 1870, and on that day was put an end to by Johnson without fault or default on Walker's part. 3d, Same as last, and that Walker was thereby damaged, which he offers to recoup. 4th, Statute of Frauds—that all the supposed contracts and promises in the declaration mentioned, if any, were made Nov. 6, 1869, and were not to be performed within the space of one year from the making thereof, nor was either of them; and neither of them was in writing, nor was there any memorandum or note thereof in writing signed by the defendant, or any person or persons thereunto by him lawfully authorized, according to the form of the Statute, &c. 5th, Statute of Frauds—that the supposed contracts were made about 15th of April, 1870, and not to be performed, &c; 6th, Statute of Frauds—that the supposed contracts and promises in the declaration mentioned, if any such were made, whenever the same were or either of them was made, were not nor was either of them to be performed within the space of one year from the making thereof, &c., &c. (P. Rec. pp. 14, 15).

By stipulation, replications waived and the amendments to declaration considered as filed, Nov. 9, 1874, and pleas to stand to all the counts. (P. Rec. p. 68).

STATEMENT OF FACTS.

By an Act of the General Assembly of Illinois, entitled "an act for canal and river improvements," approved Feb. 28, 1867, the improvement of the Illinois and Michigan canal, and the Illinois, Rock and other rivers through the instrumentality of a board of canal commissioners thereby created, was provided for.

Power was given to said board to make contracts, and by the 8th Section, it was provided that "the work on all contracts may be suspended, whenever the state of finances require it, which right to suspend shall be inserted in all contracts." (Pub. Laws, Illinois, 1867, p. 81.)

By an Act of the Assembly, entitled "an act to amend an act entitled 'an act for canal and river improvements,'" approved Feb. 28, 1869, an appropriation was made for certain improvements, including one lock and one dam on the Illinois River, approved Feb. 25, 1869. (Pub. Laws, Illinois, p. 60.)

Upon the trial, it appeared that Charles B. Farwell, Edwin J. Sherburne, and Edwin Walker obtained the contract to construct the lock and dam at Henry, Illinois, and that the contract in writing was duly executed by them and the Canal Commissioners, July 21st, 1869. (P. Rec. pp. 21-39).

That Sherburne sold and assigned his interest to one James K. Lake. (P. Rec. pp. 41).

The canal contract provided (P. Rec. p. 25) that "the said Edwin J. Sherburne, Edwin Walker and Charles B. Farwell shall commence the said lock and dam on or before the first day of August, eighteen hundred and sixty-nine (1869), and complete the same by the first day of June, 1871, unless unavoidably prevented by high water

in the Illinois river, in which case it shall be completed on or before the first day of September, eighteen hundred and seventy-one (1871)."

The Canal Commissioners also reserved "the right to suspend the work whenever the state of the finances shall require it, as provided in section eight of the 'Act for canal and river improvements, approved February 28th, 1867.'"

D. C. Jenne, the Canal Commissioners' Chief Engineer, in charge of the lock and dam at Henry, testified (P. Rec. p. 50): "Calculating from the beginning, it would be necessary for all the stone, under the contract, to be delivered by June or July 1st, 1871, in order to enable the contractor on the lock to comply, but the largest portion should have been delivered in 1870, as the thing ran: that is from July, 1869. The contract was drawn with reference to the time within which the work could be reasonably done. The work was to be commenced Aug. 1st, 1869, and completed June 1, 1871, unless high water prevented, in which case by Sept."

On the 23d day of July, A. D. 1869, Farwell, Lake and Walker entered into written articles of agreement (P. Rec. p. 41), wherein after reciting the award of the canal contract to Farwell, Sherburne and Walker, and the assignment of Sherburne's interest to Lake, they severally covenanted, promised and agreed to execute, perform and fulfill said contract (i. e. the canal contract), "in all things as required thereby," in accordance with the covenants of this instrument as between themselves, which, among other things, were that Farwell should manage the financial affairs, relating to and growing out of the canal contract: that he and Walker should furnish the money necessary to carry out said contract: that Lake should give his care, skill and diligence, and "that the said Walker shall furnish all the stone required for the construction of said lock and dam, to be by him delivered on board of canal boats at Henry aforesaid, as

the same may be required in the progress of said work, said stone to be of the form, description and dimensions of said work, for which the said Walker shall receive the following rates for all such stone so delivered as aforesaid, to be paid in warrants of the Auditor of the State of Illinois, to-wit: For all canal bank stone, one dollar and forty cents per cubic yard; for all vertical or battered wall, or heavy rubble stone, furnished from his quarry, three dollars and thirty-eight cents per cubic yard: for all lock and dimension stone, seven dollars and forty-five cents per cubic yard. The cost of tonnage of canal boats, loaded with said stone, from LaSalle to Henry, shall be borne by the parties hereto.

The quantity of the several kinds of stone which shall be delivered as aforesaid, shall be ascertained from the estimates made from time to time by the engineer in charge of the construction of said lock and dam."

It further appeared that on the 6th day of November, A.D., 1869, the canal contract was assigned by Farwell, Lake and Walker to Johnson, plaintiff in this suit. (P. Rec. pp. 40, 41.)

As to the Farwell, Lake and Walker contract, Mr. Johnson, the plaintiff, testified (P. Rec. p. 43), that it "was not assigned in writing, but was handed to me at the time, and Walker said he would furnish stone under it if I desired; would carry out that contract. In a few days I notified him that I wished him to do so. He commenced delivering stone the next Spring on the contract * * He delivered stone to the last of May or first of June, 1870, and stopped. Can't say why. Presume it was low water."

On the other hand Walker testified that in Nov. 1869, when Johnson purchased the canal contract, the outstanding contracts for lumber, &c., were assigned to Johnson in writing, not including the Farwell, Lake and Walker contract, and that as to that it was left optional with Johnson to take stone at the price named therein. Walker says: "I told him if he wished to purchase elsewhere he could. If he wanted I should furnish any portion of

them at any particular time, I should be willing to do so, and help in any way I could." That this was in November, and that the next April Johnson requested him to go on and deliver some stone, which he commenced and continued to do until May 12, 1870, when stopped by a telegram from Wells, Johnson's agent and manager, (Johnson lived in New York and was absent a great deal), which was followed by a letter written the same day. (P. Rec. p. 53.)

The telegram of May 12 (P. Rec. p. 53) stated: "I cannot receive any stone shipped from your quarry after this day. Have written particulars." The letter (P. Rec. p. 53) of May 12, stated: "My orders from Willard Johnson are, if you did not send stone *from the canal bank*, that I must stop receiving stone from your quarry entirely. Last evening I received telegram from Mr. Hays, our foreman, to the effect that there were no derricks put up for loading stone from canal bank. I have extended the time several days later than Johnson gave me, but I can wait no longer. *Therefore*, I cannot receive any stone shipped from your quarry after this day, the 12th of May, 1870."

The canal contract enumerated among other kinds of stone, "canal bank stone;" but Johnson testified (P. Rec. p. 43) that this expression in the contract referred to "riff-raff, or loose stone," and this was conceded. It appeared, however, that Johnson got the idea that some *vertical* stone might be got out of the canal bank (*i. e.* the stone thrown out in excavating the canal), and transportation made cheaper, as tolls were not charged on stone from the banks. The great preponderance of evidence was that there was no stone in the canal bank fit for vertical, and there was no evidence that Walker agreed to furnish stone from the canal bank, except for riff-raff, and this he did, "until," as plaintiff's witness, Wells, testifies (p. 47), "the engineer said he had plenty."

This being so, the stoppage of Walker in the delivery of stone was wrongful. This was not disputed; and, as the Court says in the charge to the jury, the plaintiff sought to avoid the effect, by evidence of a subsequent agreement to go on.

Johnson testified (P. Rec., p. 51,) that on the 28th or 29th of May, Walker agreed to "deliver by rail," "lock stone" (i. e. dimension) and not "rubble" or "vertical:" that the lock stone was to be delivered at Henry free of charge at the contract price of $7.45: but he says at the same time time, "I had no other contract with Walker than his agreement by word of mouth, to fulfill the written contract between Farwell, Lake and Walker."

Evidence was also adduced on plaintiff's behalf that in June, 1870, Walker was at Henry and agreed to deliver stone to Johnson "according to the old contract," one witness (Smith, P. Rec., p. 51,) testifying nothing was said about delivery by rail, and another (Wells, P. Rec., p. 47,) that Walker said he would deliver by rail.

But Walker testified (p. 53,) that he delivered no more stone to Johnson after receiving the telegram of May 12, though it appeared that three stone were offered to Johnson the last of August or first of September in Walker's absence, which had been intended for the St. Louis market. (P. Rec., p. 60.) Walker denied that he ever made any agreement after May 12, to deliver stone, or any agreement at any time to deliver by rail: and testified that transportation by rail cost $6, and by water $3, and the stone were worth at the quarry from $4 to $5, so that at the contract price, $7.45, the cost of rail delivery would nearly absorb the whole amount.

The questions contested upon the trial were:

1. Whether Walker ever contracted with Johnson to deliver stone?

2. Whether, if so, such contract was within the Statute of Frauds?

3. Whether, if such contract existed, and it was not within the Statute, there was ever any valid waiver of the admitted rescission of May 12, or valid renewal of the contract thereafterwards?

And various others arose in reference to damages, &c.

There was no controversy as to what the contract was, if any existed. It was a verbal agreement to carry out the Farwell, Lake and Walker contract.

This Johnson, the plaintiff, repeatedly testified to.

The jury found that there was such a contract and gave damages for its breach.

The matters of law arising upon the rulings of the Court below will be presented by the assignment of errors and the argument in support thereof.

In assigning errors I am obliged, in justice to the Court below, to quote more largely from the charge than would otherwise be necessary.

ASSIGNMENT OF ERRORS.

I.

That the Court below erred in refusing to instruct the jury as requested by the defendant Walker, as follows: (P. Rec., p. 62.)

"That if a verbal agreement was made in November, 1869, by which defendant agreed with the plaintiff to carry out the Farwell, Lake and Walker agreement, so far as relates to the delivery of the stone, as therein specified, and such agreement between plaintiff and defendant was not in writing, and signed by defendant or any person or persons duly thereto authorized for him, and no memorandum or note thereof in writing was made and signed by defendant, or some person or persons duly authorized for him, then such agreement is within the Statute of Frauds, and void, if it appear from the Farwell, Lake and Walker contract that *it was not the intention and understanding of the parties* that the same should be performed by the defendant within the space

of one year from the making of the verbal agreement between plaintiff and defendant.

That this is also the law if the supposed verbal agreement was made in April, 1870, and it was not the understanding and agreement that it was to be performed within a year thereafter.

Mere physical possibility of performance of an agreement within a year does not take it out of the Statute. The question of performance depends upon *what the intention and understanding of the parties to the agreement was in regard to it.*"

And in instructing the jury upon the subject of the Statute of Frauds, as follows: (P. Rec., p. 64.)

"Defendant insists that as the contractors, with the State had more than one year from the making of this contract, in which to complete the lock and dam, and as the defendant was only to deliver the materials as wanted for the work, therefore, more than one year was intended between the parties as the time for the completion of the stone contract; and that as plaintiff at most only claims that defendant agreed with him to deliver the stone to plaintiff on the same terms, and in the same manner he had agreed to do for Farwell and Lake, they must necessarily have intended that the contract was not to be performed within a year.

I do not think this reasoning is sound. The fact that the dam and lock were not by the contract with the State to be completed before June or September, 1871, did not preclude the contractors from completing it at an earlier day, if they saw fit, nor did it preclude them from calling upon defendant for this stone as fast as they wanted it for the purpose of pushing on the work.

I find nothing in the contract with the State, nor in the contract between the defendant, Farwell and Lake, which prevented the contracting parties in the original contract from completing the contract at an earlier day, than that limited in the said State contract.

If the contract by its terms is not to be completed within a year then of course there would be no doubt about the application of the Statute. If it said in so many words that it is not to be performed within a term beyond a year from the time of making the contract, it must obviously be considered within the provisions of

the Statute. If the contract from a fair construction of all the clauses and the provisions when taken together shows manifestly that it was not intended that it should be performed within a year, then the contract would be considered as within the Statute; but you must explore only the contract itself. You cannot go outside of the contract for the purpose of determining that question. The contract between these parties being a parol contract, however, you must take it and all that the parties say about the contract, for the purpose of determining this question, and determining what they intended and meant by it.

Here, however, the aspect of the question presented to us, is a written contract made between certain parties, and which it is claimed the defendant agreed with the plaintiff that he would perform, and the question is, *when* did he intend or agree to perform it?

If the contract is such that *either* party may insist upon its performance within a year, and place the other in default, if not performed, then the contract is not within the Statute. This I lay down as a general rule, and as a fair test, by which to determine the question of whether this contract was within the Statute or not.

If you find from the evidence in this case, that while there was no specific time fixed by the terms of the contract, or fairly deducible from it, for its performance, yet it was of such a nature that it might have been performed within a year, that is, if *either* party could have insisted upon its performance within a year, then the Statute does not apply.

It is not a question whether it is probable or improbable that all this stone would not have been required by the plaintiff for the completion of the work within a year. That would involve a consideration of circumstances and contingencies with which we have nothing to do. But if the plaintiff had concluded to press his work with such vigor and rapidity as to require all the stone from the defendant during the year, had he a right under the contract to do so? *That is a fair test.* The contract of the defendant with Farwell and Lake binds the defendant to deliver the stone, as the same may be required "in the progress of said work." So that the rapidity of the progress of the work is the measure of the rapidity

with which the defendant is to deliver the stone, and if you are satisfied from the evidence that the defendant agreed with the plaintiff to deliver the stone, in the same manner in which he had agreed with Farwell and Lake to deliver them, and *that such contract was one which might have been required to be performed within a year, at the plaintiff's option*, then said contract is not within the Statute."

II.

The Court also erred in instructing the jury as follows: (P. Rec. p. 63.)

"The plaintiff claims that, by the agreement made with the defendant, in the spring or summer of 1870, the defendant agreed to deliver by rail. It was competent for the parties to change the contract in that regard if they chose to do so.

It is for you to say whether it was agreed to so change the mode of delivery or not, and unless the evidence satisfies you that the defendant did agree to change the mode of delivery and to deliver by rail, then the defendant would be entitled and required to deliver by canal boats, as specified in the original contract. The delivery by rail would be but a modification of the original contract, and such a modification as the parties might make, as the contract progressed, by reason of any exigency which should arise. If he did agree to deliver by rail, then such agreement was binding according to its terms, as shown by the evidence: that is, you must ascertain from the proof what the defendant did agree to do, if anything in the way of delivering by rail: and he is bound by such agreement, as you shall find from the proof made, if any."

III.

The Court erred in instructing the jury, as follows (P. Rec. p. 66):

"The evidence on the part of the defense rests on the telegram and letters of Wells to the defendant, directing the defendant to stop delivering or imparting such a direction.

The plaintiff claims to avoid the effect of this by proof

tending to show that defendant, after the order to stop, promised to perform the contract, and so conducted himself as to lead the plaintiff to believe that he intended to comply with the contract: in fact, that both parties waived the stoppage or suspension of performance indicated by Wells' letter and telegram, and acknowledged the contract as still in force, and binding upon the parties.

If the testimony satisfies you that the defendant did, after the notice of the 12th of May, recognize the contract as still in force, and promise the plaintiff that he would go on and complete the same, the defendant cannot now claim as a defense to this action that said notice released him from the performance of the contract.

If, on the contrary, you are satisfied that the defendant made no agreement after the notice to stop on the 12th of May, recognizing the contract as still in force, or promising to perform it or continue it in force, then the defense may be considered made out, although the notice to suspend might entitle the defendant to damages; but I do not think it necessary to discuss the question of the defendant's damages.

The defendant's claim is, that even if any such contract as contended for by the plaintiff was made, the plaintiff stopped the performance of it, by his own act, and that the defendant is entitled to damages by reason of such stoppage.

Such position might perhaps be sound and allowed in this case, if the proof sustained the position taken by counsel. But I think in order to make out a claim for damages on the part of the defendant, growing out of the stoppage, he should have followed up the proof, by showing that the defendant on being notified to stop offered to go on, and was ready and willing to have gone on and completed the contract, and as there is no pretense that any such offer was made immediately upon the direction to stop, I don't think that any claim for damages can be considered by the jury, especially if you find the defendant afterwards recognized the contract as in force, and agreed to go on to fulfill it, either as originally made, or as modified so as to require delivery of said stone by rail."

IV.

The Court erred in refusing to instruct, as requested by defendant, as follows (P. Rec. p. 67):

"That verbal admissions, while if deliberately made and precisely identified, they frequently furnish satisfactory evidence, are to be received with great caution, and the attention of the jury should be directed in passing upon alleged verbal admissions, to whether the witnesses testifying thereto distinctly understood the party charged in what he said, and whether they have or have not, intentionally or unintentionally, failed to express what was actually said." But the Court refused said instruction.

V.

The Court below erred in overruling the defendant's motion for new trial (P. Rec. p. 17).

BRIEF AND ARGUMENT.

First point: The Court erred in refusing to give the instructions in reference to the Statute of Frauds, requested by the defendant below, Walker, and in giving the instructions which the Court gave upon that subject.

The canal contract, as already remarked, provided (p. 25) that the contractors "shall commence the said lock and dam on or before the first day of August, 1869, and complete the same by June 1, 1871, unless unavoidably prevented by high water in the Illinois River, in which case it shall be completed on or before the first day of September, 1871."

The Farwell, Lake and Walker contract was entered into for the carrying out of the canal contract.

The jury found that Walker agreed with Johnson to perform so much of the Farwell, Lake and Walker contract as related to the furnishing of the stone.

As averred in the declaration and as true in fact, the lock and dam were to be constructed substantially of stone.

And when Walker executed the Farwell, Lake and Walker contract, he thereby agreed to deliver the stone as required in the progress of the work under the canal

contract, which contract provided that the work should be commenced on or before Aug. 1, 1869, and completed by June 1st or Sept. 1, 1871.

The same contract provided for the shipment of stone from the canal banks, by the canal, free of tolls (P. Rec. p. 38).

The Farwell, Lake and Walker contract provided for delivery "on board of canal boats at Henry" (P. Rec. p. 42), and that cost of tonnage should be borne by the parties.

So it was contemplated that the delivery should be by water, which not only involved the suspension of delivery during the winter, but also during low water in the Illinois river during the summer, the boats being taken to LaSalle by canal, and from LaSalle to Henry by river.

The provision of the Illinois Statute of Frauds bearing on this question was that "no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

R. Stat. 1845, Chap. 44, Sec. 1, p. 258.
Gross' Stat. 1868, p. 316.

It is conceded that the agreement in the case at bar was not in writing. Was it to be performed within one year from the making thereof? If not, it was void, and this judgment must be reversed.

Mr. Browne, in his work on the Statute of Frauds, Sec. 279, p. 281, says: "The Statute finding them (the parties) perfectly free to make a certain contract, without a writing, provides simply that if that contract does, by its terms expressed, or, from the situation of the par-

ties, reasonably implied, require more than a year for its performance, they must put it in writing."

And on p. 285, Sec. 283: "When the manifest intent and understanding of the parties are that the contract shall not be executed within the year, the mere fact that it is possible that the thing agreed to be done, may be done within the year, will not prevent the Statute from applying. Physical possibility is not what is meant when it is said that if the verbal contract may be performed within the year, it is binding, or, to speak exactly, it is not enough that the thing stipulated may be accomplished in a less time, but such an accomplishment must be an execution of the contract according to the understanding of the parties."

The possibility of performance within the year contemplated by the Statute, must necessarily be a possibility of performance according to the terms of the contract, and in accordance with its provisions unchanged, and not the possibility of performance by waiving its provisions, and modifying its terms so as to change it from one not to be performed within the year to one to be performed within that period.

The contingency which can save the contract from the operation of the Statute must exist in the contract, be created originally by it, and inhere in its terms, and not be a mere contingency that the parties may change their minds, and alter the contract into a legal one.

In *Packet Company* v. *Sickles*, 5 Wallace, 580, the contract was to pay for a right to use an invention on a certain boat, so much a year, for twelve years, "*if* the said boat should last so long," and this Court held the latter provision did not take the agreement out of the Statute. "That the possibility of defeasance does not make it less a contract not to be performed within the year."

The Court say, NELSON, J., delivering the opinion:

"In *Birch* v. *The Earl of Liverpool*, a contract for hire

of a coach for five years, for a stipulated price per year, was held to be within the Statute, although determinable by either party at any time within that period.

The same principle was again held in *Dobson and another* v. *Espie*. That case was the hiring of a traveler for more than a year, subject to a determination by three months' notice. Pollock, C. B., in delivering his opinion, stated that the object of the enactment was to prevent contracts not to be performed within the year from being vouched by parol evidence, when at a future period any question might arise as to their terms.

No doubt, he further observes, formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law, as strictly as possible; but, in my opinion, that is not the proper course of proceeding.

Alderson, B., observed: 'The very circumstance that the contract exceeds the year, brings it within the Statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, which might come into operation before the end of the first year.'

We might refer to many other cases arising upon this statute. They are numerous, and not always consistent, for the reason, probably, given by Pollock, C. B., that the Court at first construed the enactment as strictly as possible, as it interfered with the common law. We think the construction given in the cases referred to is sound, *and adopt it.*"

The leading case is *Boydell* v. *Drummond*, 11 East, p. 142. The Boydells had proposed to publish by subscription a series of large prints illustrating scenes from Shakspeare. There were to be eighteen numbers of the work, each number to contain four prints, and the price to be three guineas the number. The defendant became a subscriber. A prospectus issued by the Boydells, with

reference to which the parties appeared to have contracted, set forth that "one number at least should be published annually, and the proprietors were confident they would be enabled to produce two numbers within the course of every year." The defendant having received two numbers and refused to take any more, this action was brought against him to recover the price of the remaining numbers, the Boydells having duly laid them aside for him as they came out. The judges were unanimous in holding that the Statute applied to the defendant's engagement. Lord Ellenborough said: "The whole scope of the undertaking shows that it was not to be performed within a year: and if, contrary to all physical probability, it could have been performed within that time, yet *the whole work could not have been obtruded upon the subscribers at once*, so as to have entitled the publishers to demand payment of the whole subscription from them in the year." Grove, J., said that, considering the nature of the work and of the prospectus, it was "impossible to say that the parties *contemplated* that the work was to be performed within a year." *Boydell* v. *Drummond* was cited as with approval by this court in the Packet Company's case, in 5 Wallace, yet the learned judge of the court below has really overruled it in that portion of his charge under consideration.

The Court below refused to charge that a verbal agreement between Johnson and Walker made in November, 1869, whereby Walker agreed to carry out the Farwell, Lake and Walker contract, was within the Statute, and *did* instruct:

1. That the contract if any, between Walker and Johnson was verbal merely:

2. That neither the State contract, nor the Farwell, Lake and Walker contract, nor both taken together, provided *in express terms* that the work was *not* to be performed within one year:

3. That if the agreement showed manifestly that it was not intended to be performed within the space of a year, then it would be within the Statute, but that the true test as to that was, could *either* party insist upon its performance within a year, and put the other in default on non-compliance?

4. And that it was for the jury to determine whether the contract was such a one as might have been required to be performed within one year, at plaintiff's option.

Assuming, as the Court properly did, that the only contract between Walker and Johnson, if any, was a verbal agreement by Walker to carry out the Farwell, Lake and Walker contract, then it was for the Court and not the jury, to examine the latter contract in connection with the canal contract, and place thereon the true legal construction, thereby determining the question as to whether it was within the contemplation of the parties that the furnishing of the stone should or could be required within the space of one year.

It is submitted, with all deference to the Court below, that such an examination can lead to but one result. The Farwell, Lake and Walker contract stipulated for the delivery of the stone *by water*, which could only be at certain seasons. The work was to be chiefly of stone. Nearly two years was provided for its completion.

In the language of Lord Ellenborough, "the whole scope of the undertaking shows that it was not to be performed within a year, and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the" contractees at once, so as to have entitled the contractors to demand payment If we leave the written contract, and take into consideration the surrounding circumstances, the case becomes still plainer.

Jenne, the Chief Engineer, testifies (p. 50): "Before the lock and dam were built at Henry, the usual boat

season, during which boats loaded with stone could be towed from LaSalle to Henry, would be three or four months in the year, including both spring and fall."

Walker says (p. 54): "They reckon about five months out of the twelve for navigating the Illinois river." * * "It would take in the neighborhood of eighteen months to deliver the stone described in the Farwell, Lake and Walker contract, so as to meet the canal contract."

Taking the language of the two written contracts, and the circumstances, and nothing can be clearer than that Walker could not have been required to deliver all the stone within a year or be put in default.

The Court left the question to the jury as follows (p. 65): "But if the plaintiff had concluded to press his work with such vigor and rapidity as to require all the stone from the defendant during the year, had he a right under this contract to do so? That is a fair test. The contract of the defendant with Farwell and Lake binds the defendant to deliver the stone as the same may be required 'in the progress of said work.' So that the rapidity of the progress of the work is the measure of the rapidity with which the defendant is to deliver the stone; and if you are satisfied from the evidence that the defendant agreed with the plaintiff to deliver the stone in the same manner which he had agreed with Farwell and Lake to deliver them, and that such contract was one which might have been required to be performed within a year at the plaintiff's option, then said contract is not within the statute."

The Court erred here in the construction of the contract. The question related to the Farwell, Lake and Walker contract. Was it within the contemplation of Farwell, Lake and Walker, that Walker might be required by Farwell and Lake to furnish *all* the stone on canal boats at Henry within a year? Within a year from July 23, 1869, when the Farwell, Lake and Walker contract

was entered into, or within a year from Nov. 6, 1869, when Johnson took hold?

On the contrary, the two contracts show that the stone was to be delivered during the fall of 1869, the spring of 1870, the fall of 1870 and spring of 1871, and that it was intended and understood that the seasons of navigation in each of those years were to be availed of. It was possible to put Walker in default as to particular amounts of stone if he refused to deliver, but it was *impossible* to require him to deliver *all the stone* in any one year, and that fixes the construction that the contract as such was not one to be performed within one year.

I do not here speak of any alleged modification of the supposed contract. That will be discussed in another connection: but taking the point discussed by the Court below, upon the alleged contract as stated by the Court, the Court erred in its exposition and application of the Statute of Frauds, and in refusing to charge the jury as requested by the defendant, which request has been heretofore set forth, and is to be found on page 62 of the printed record.

And the court also erred in charging that (bottom of page 65:) "the fact that the defendant had within a few months after the contract with the State was made, delivered almost half of this stone, is of importance, as tending to show that the work *could have been* fully performed by the defendant within a year from the time that the plaintiff and defendant made their contract, if you find that one was made."

This is error, because inconsistent with the previous instruction of the Court, that, for the purpose of getting at the intent, the jury could not go "outside of the contract," and it is error because the physical possibility had nothing to do with the question.

It is true, however, that courts will, when requisite to ascertain the intention, put themselves in the place of the

parties, and therefore proof of the surrounding circumstances is admissible. Hence, to get at the intention of Farwell, Lake and Walker, to ascertain what *they* contemplated in executing the contract between themselves, the facts that they being the Canal contractors required nearly two years to be stipulated for the completion of the work, which was to be chiefly of stone; that the delivery of the stone was to be by water: that the lock stone had to be quarried, which could only be done at certain seasons of the year, etc., were all proper subjects of consideration, but none of them are thus presented by the Court below in the charge.

The paragraph is otherwise erroneous.

It was proven in the case that by reason of a flood in the fall of 1869, there was good water until Nov. 1st, and an unusual opportunity to deliver, and that the stone which Walker did deliver was chiefly "riff raff" or loose stone, which came from the canal bank. (The figures are given by *Jenne* p. 49. Loose stone, 5,150 yards, slope wall 550 yards, vertical 770 yards, backing, 1,760 yards; face stone 49 yards. *Jenne* says "slope" comes under head of loose stone.)

Now the face or lock stone had to be quarried, and the quarries were shown to be not susceptible of being worked until late spring.

It was comparatively easy to send the loose stone down, the flood rendering navigation possible, and this explained the large delivery in the fall of 1869, but this threw but little, if any light upon the possibilities of 1870, and I think it therefore proper to suggest that the court below erred in the paragraph in question because not justified by the facts.

Second point. The Court erred in that portion of the charge relating to a change of contract from delivery by water to delivery by rail.

This will be found near the bottom of page 63 of the

printed record, and is quoted *in extenso* in the second error assigned.

It must be conceded and was so assumed by the Court, and may therefore, be taken as undisputed, that on the 12th day of May, 1870, Walker was stopped by Johnson in the delivery of stone, without reasonable excuse therefor.

But Johnson testifies, (p. 51), that on the 28th or 29th of May, Walker agreed that he would deliver lock stone *by rail* at Henry at $7.45, free of charge, this being the price named in the canal contract for that stone, delivered by water, and Johnson attempts to prove that Walker also so agreed in the following June.

Walker swears he made no such agreement, either in May or June, although at Johnson's request he had his bookkeeper, one Champion, inquire for Johnson about the 4th or 5th of May, as to what transportation by rail would cost, and Champion wrote Johnson about it, though Walker never saw the letter. Mr. Walker further testifies that by water the transportation cost $3, leaving $4.45 for the lock stone out of $7.45, the canal contract price, and that the stone *at the quarry* would be worth from $4 to $5, while at $15 per car, (the going rate), the transportation by rail would cost $6, leaving only $1.45 for the stone. (P. Rec. 54.)

It is not only so utterly impossible, as matter of fact, that Walker would agree to deliver stone worth $4 to $5, at $1.45, that the verdict ought to be set aside as against the evidence, but it is enough that, as matter of law, the alleged agreement would be entirely invalid unless founded on some new and sufficient consideration. The Court below was, therefore, in error in saying that if Walker "did agree to deliver by rail, then such agreement was binding, according to its terms," not only because that would depend upon the existence of a new consideration, to which the Court did not allude, but be-

cause it was not pretended that there was any evidence of such.

The authorities are much considered, and the principles applicable luminously discussed in *Thurston* v. *Ludwig*, 6 Ohio St. R., 1, wherein it is ruled that "a verbal agreement, to be effectual as a waiver, variation or change in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by the parties, that a refusal to carry it out would operate as a fraud upon one of the parties." Citing:

Gross v. *Nugent*, 5 B. & Ad., 65.

Lattimore v. *Henson*, 14 John. R., 330.

Munroe v. *Perkins*, 9 Pick., 295, and many others.

Mutual promises may always give birth to a contract, and may, therefore, alter or destroy it by creating a new agreement inconsistent with the first, but the mutuality must be *real* in order to be effectual, and the subsequent agreement will not be binding on either side, unless it vary the obligation of the antecedent contract on both.

Crowley v. *Vitley*, 7 Exeq., 319.

Payne v. *New S. W. C. Co.*, 10 Exchq., 291.

For it can hardly be supposed that a promise, which works no change in the position of one party, can serve as a consideration for the relinquishment of a right or the assumption of a duty by the other.

It has, therefore, been accordingly held, that a waiver of the right given by a prior contract is not binding, unless acted on by the *parties*, or founded on some new and sufficient consideration, and although in some of the cases the contract was written, the reasoning was equally applicable to merely verbal agreements.

Thurston v. *Ludwig*, 6 Ohio St. R., 1.

Hunt v. *Barfield*, 19 Ala., 117.

Adams v. *Nichols*, 19 Pick., 275.

Walker delivered no stone after May 12, and Johnson

could not put himself in the position of claiming an estoppel for non-delivery under an agreement without consideration.

As remarked by Lord Campbell, in *Gerhard* v. *Bates*, 2 Ellis & B., (75 Eng. C. L.) 486: "A prejudice to the promisee incurred at the request of the promisor, may be a consideration, as well as a benefit to the promisor proceeding from the promisee: but this must be a prejudice on *entering into the contract*, not a prejudice from *the breach of it*."

The Court below erred in instructing the jury that if Walker said after May 12th, that he would deliver, and that, by rail, he would therefore be bound to do so.

The binding obligation of such an agreement depended upon considerations entirely unadverted to and ignored by the Court.

The Court in *Thurston* v. *Ludwig*, 6 Ohio Stat., 7, adverting to *Goss* v. *Nugent*, 5 B. and A., 65, say that while in that case the doctrine that a written contract may be annulled, or its terms altered by a subsequnt verbal contract, is laid down by Lord Denman in the broadest language, it is not pretended that it can be done otherwise than by a "*new contract*," which, of course, must be founded on a new and distinct consideration.

Again, the rule to which the Court is referring in the charge, that parties by a new contract may modify a former agreement, even though in writing, is subject to the limitation that the original is *not within the Statute of Frauds*, and that the modification is *before breach*.

In the case at bar, plaintiff gives evidence tending to show that defendant agreed by parol to carry out the Farwell, Lake and Walker contract, and commenced to do so. He was stopped on the 12th of May, by plaintiff, without reason. Subsequently to that, plaintiff says Walker agreed to deliver lock stone by rail.

To deliver by rail was a modification of the written contract, and if the agreement to carry out that contract were within the statute, the variation was also within it.

This alleged substituted parol contract was after breach, and the rule invoked is not applicable in such case.

So that it seems to follow that the Court so incorrectly presented this branch of the case as to fully sustain defendant in the exception taken upon the trial.

Third point. The Court erred in that portion of the charge relating to the stoppage of performance by Walker, May 12.

This will be found on page 66 of the printed record, and is quoted under the third error assigned.

The telegram and letter from Wells, (p. rec. p. 53), who was Johnson's manager and agent, forbade any further delivery by Walker, and it was conceded that this was without any legal or valid reason, but it was contended that this rescission was waived by Walker agreeing in June to go on and deliver by rail.

The Court told the jury that if they were satisfied that Walker after May 12, recognized the contract as still in force, and promised Johnson that he would go on and complete it, then Walker could not now claim that he was released from performance.

This is open to the same objection as presented under the preceding point.

If Walker being ordered to stop, did so, and never resumed, then his saying he would go on would not constitute a binding agreement to do so unless upon some new consideration.

The element of estoppel is hinted at by the Court in stating that the plaintiff claims to avoid the effect of his own order to stop, by proof "tending to show that the defendant, after the order to stop, promised to perform

the contract, and *so conducted himself as to lead the plaintiffs to believe that he intended to comply with the contract*," but this is not followed up. The jury are instructed that Johnson undertakes to avoid the effect of his own act in that way, but are *not* instructed that *unless* new consideration is shown, *or* conduct operating to Johnson's injury, the alleged agreement was no agreement at all.

But this part of the charge is open to other serious objection. The Court say:

"If, on the contrary, you are satisfied that the defendant made an agreement after the notice to stop on the 12th of May, recognizing the contract as still in force, or promising to perform it, or continue it in force, then the defense may be considered made out, *although* the notice to suspend might entitle the defendant to damages, but I do not think it is necessary to discuss this question of the defendant's damages. The defendant's claim is, that even if any such contract as contended for by the plaintiff was made, the plaintiff stopped the performance of it by his own act, and that the defendant is entitled to damages by reason of such stoppage."

The difficulty with this is that it confounds two separate and distinct defenses, and deprives the defendant of the real and more important ground upon which he stood.

He contended that he was stopped by the act of the plaintiff, and never resumed or agreed to do so. It was conceded that he was so stopped, and without fault on his part. It was claimed that he agreed to resume.

If he did not, then there could be no recovery by the plaintiff. And the defendant might not only defeat the plaintiff, but might be entitled himself to damages. The latter, however, did not necessarily follow upon the former, and what the defendant had the right to expect of the Court, was a distinct instruction that if the jury were satisfied, from the evidence, that defendant was

stopped without cause, and did not resume or agree to do so, then the plaintiff could not recover damages for the non-fulfillment of a contract, the performance of which the plaintiff himself prohibited.

The chief importance of the notice to suspend was not its relation to the question of defendant's claim for damages, but plaintiff's, and the Court below certainly, no doubt through inadvertence, overthrew a clean cut, specific and conclusive defense, in the effort to point out that defendant had no claim for damages under the circumstances.

I submit that we have here a palpable case of the misleading of a jury. It was accidental and is to be regretted, but it is before us in the record, and ought to reverse the judgment.

Fourth point. The Court erred in refusing to instruct the jury as to verbal admissions, as requested by the defendant. See page 67 of the printed record.

The requested instruction was substantially couched in the language of Professor Greenleaf, (1 Vol. Ev. Sec. 200), and was in itself unobjectionable.

Did not this case justify the caution contained in it? Did it not indeed absolutely demand it? It seems to me that this case in an especial degree required the application of the salutary general rule on the subject of verbal statements.

The defendant had been stopped in the delivery of stone and without reason. To hold him for breach of contract to deliver, it was sought to prove that he verbally agreed to waive the rescission and not only to go on, but in a doubly expensive mode not provided for in the original contract, namely, by rail. The attempt was to establish this by evidence of conversations.

Defendant did not deny conversations on the subject of Johnson procuring stone, but he did utterly and specifically deny that he ever agreed as represented.

Whether he did or not was matter for the jury, but surely defendant was entitled to have the attention of the jury called to the importance of the question, as to whether the witnesses testifying as to what he said, distinctly understood him and faithfully repeated it.

Fifth point. The Court erred in overruling the defendant's motion for a new trial.

I make this point in order more particularly that your Honors may see that all the reasons for reversal urged here were presented to the Court below, and assigned as grounds for setting aside the verdict. The motion will be found on page 17 of the printed record.

It may be added that the jury evidently gave damages for the non-performance of the alleged original contract, yet that contract had been rescinded on the 12th of May, and the evidence of plaintiff was to the effect that a new contract was afterwards made for the delivering of lock stone only, and that by rail. Clearly, then, not only was the jury not justified in finding a verdict for damages for breach of the alleged agreement to carry out the Farwell, Lake and Walker contract; but the 12th ground assigned for new trial was well taken, namely, "that the Court erred in not instructing the jury that a new agreement after the 12th day of May, 1870, not made with the intention of continuing the former alleged contract in force, would not deprive the defendant of his defense arising upon the notice to stop performance of said original alleged contract."

Respectfully submitted:

MELVILLE W. FULLER.

of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1877.

EDWIN WALKER,
Plaintiff in Error,
v.
WILLARD JOHNSON,
Defendant in Error.
No. 249.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

MELVILLE W. FULLER,
For Plaintiff in Error.

CHICAGO:
CHICAGO LEGAL NEWS CO., PRINTERS & STEREOTYPERS, 151 & 153 Fifth Ave.
1878.

SUPREME COURT OF THE UNITED STATES.

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Defendant in Error.

No. 249.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

MAY IT PLEASE YOUR HONORS:

Johnson, the plaintiff below, can certainly not complain if we take his own evidence in support of his alleged cause of action.

He testified (P. Rec., p. 43), that in November, 1869, Walker agreed with him to carry out the Farwell, Lake & Walker contract, and (P. Rec., p. 51) that he never had any other agreement than that. He also said that Walker stopped in May, 1870, he presumes, on account of low

water (P. Rec., 43), and that after that, on May 28th or 29th (P. Rec., p. 51), Walker agreed to go on and deliv- *by rail.*

Without dwelling in this connection upon what passed, if anything, after May 12, 1870, the day Walker was ordered to stop and did so, the contract, as it stood up to May 12, was an agreement by word of mouth to carry out the Farwell, Lake & Walker contract in the matter of the delivery of the stone. And although Walker denied even this agreement, yet we assume it to have existed, because the jury have in effect so found.

This being so, the inquiry was, so far as the statute of frauds is concerned—was it within the contemplation of the parties, that under the Farwell, Lake & Walker contract, *all* the stone provided for should be delivered within the space of one year "from the making thereof?" or within a year from Nov. 6, 1869, the date of the alleged agreement between Johnson and Walker?

The Court said: "If the contract, from a *fair construction* of all the clauses and provisions, when taken together, shows manifestly that it was not intended that it should be performed within a year, then the contract would be considered as within the statute;" and although this is perhaps objectionable, as leaving the matter of construction to the jury, yet if the Court had stopped there, that ground of objection might be too slight to merit discussion. But the Court did *not* stop there. On the contrary, the learned judge proceeded to say that the true test was whether *either* party could insist upon performance within a year, and then left it to the jury to determine whether the "contract was one which might have been required to be performed within a year, at *plaintiff's option.*"

This begged the question, which actually was, whether if in November, 1869, Walker agreed to carry out the Farwell, Lake and Walker contract, it was the intention

and understanding of the parties that the same should be performed by Walker within the space of one year thereafter. If the manifest intent was that the work might be executed within one year, and if it appear that such an accomplishment of the thing stipulated would be an execution of the contract according to the understanding of the parties, then such performance could have been required, and if not, not. The supposed test is no test at all, but a mere conclusion from the contract when the true construction has been arrived at.

The Farwell, Lake and Walker contract was a written agreement for the performance of the canal contract, and since the only agreement between Walker and Johnson was that Walker should *carry out* the Farwell, Lake and Walker contract, it was for the court to interpret these two written instruments.

They admit of but one construction. By the Farwell, Lake and Walker contract, Walker agreed to "furnish all the stone required for the construction of said lock and dam, to be by him delivered *on board of canal boats* at Henry aforesaid as the same may be required in the progress of said work." (P. Rec., p. 42.)

Thus, on the face of the agreement, the delivery was to be *by water*, and the court will take judicial notice that there can be *no* delivery by water in Northern Illinois in the winter. And resorting to the circumstances in evidence, it is shown that delivery by water could at that time (before this very lock and dam were finished) be had only during a limited period in the spring and fall.

The parties therefore, and by the parties I mean Farwell, Lake and Walker, and it is equally true of Johnson, could not have contemplated that Walker could be required to deliver otherwise than at those seasons, and this shows that the progress of the work was subject to that limitation. So when we turn to the canal contract, we find that the work was to be commenced by the 1st

of August, 1869, and completed by the 1st day of June or of September, 1871, which is utterly inconsistent with an intent and understanding that it should or could be completed within a year.

And still further, we find that the masonry of the lock (there was also the masonry of the dam) was by the specifications (P. Rec., p. 12) "all to be laid between the 15th day of March and the 15th day of October, unless otherwise ordered by said engineer."

Hence, it follows that not only was a period of nearly or quite two years stipulated for, but that the progress of the work was subject to the specified limitation that it should not go forward prior or subsequent to a certain date, this provision of course being intended to prohibit and prohibiting the laying of mason work in the winter season. It is therefore quite unreasonable to argue that although two years was provided for, there was no stipulation preventing doing the work in less than a year, for the clause just quoted amounts to that. And after all we are seeking the understanding of the parties.

Taking these two written contracts together, it is submitted, that the work was not intended to progress so as to be completed within a year, and neither party could require the other so to perform.

It was not, as counsel says, to be performed within the time to be *determined by Johnson*, for the work by the contract with the State could only progress at certain seasons, and the delivery of the stone by water could only be made at certain seasons, and Johnson could not abrogate these provisions and demand a delivery not stipulated for, even though he might have been permitted to make and might have made a progress on his part which rendered earlier delivery desirable. As a matter of fact, such progress was and proved to be, practically impossible.

It is unreasonable to say in the case of a contract to

erect a building, which in the ordinary course of business, could not be erected under two years, or to do something on the completion of a voyage which would ordinarily occupy two years, that because extraordinary exertion in the former case, or extraordinary weather in the latter, *might* bring the event about within a year, such *possibility* would make the contract good.

The limitation is, that though the period of the execution of the contract *may* arrive within a year from the making, yet if that cannot occur in the *natural course of events*, the parties cannot be supposed to have contracted in view of such an occurrence, and the statute applies.

In this case, Johnson could no more call for performance than the Boydells could in 11 East., 142. Because it was impossible to say that the parties *contemplated* that the work was to be performed within a year, the Court held that the Boydells could not put the other party in default by requiring performance, and that is precisely the position of the case at bar.

If the right existed to call on Walker to perform within a year, then it existed to call upon him to deliver all in a single month, irrespective of the season of the year, the state of the water, and the condition of his quarries. It is obvious that no such construction can be sustained.

It is unnecessary to follow counsel in the examination of the distinction between the different contingencies by which a contract may be terminated.

Undoubtedly where the parties make no stipulation as to time, but the performance of the agreement depends upon the happening of a certain contingency which may occur within the year, the statute would not apply. This is because the agreement *may be* performed entirely within the year, consistently *with the understanding and rights of the parties.*

Promises to do a thing when a certain event occurs which may occur within a year, as for instance to pay

money on the day of the promisor's marriage; promises to continue to do something until the contingency occur, as for instance to pay during the promisee's life; agreements to refrain altogether from certain acts, as for instance an agreement not to engage in a designated business in a certain town; are illustrations of cases not falling within the statute. The case at bar comes within none of these.

The right of the State to suspend the work, was simply if the funds proved insufficient and did not go to a termination of the contract, of which indeed it forms a part.

The agreement set up has no element of contingency about it. To hold that it does is to import into it what is not there, namely, a promise to deliver *all the stone* in a year if so required. The question whether this contract could or could not have been performed within a year is not in itself material, for physical possibility is not what is meant when it is said that if the verbal contract may be performed within a year it is binding. (Yet evidence upon that point may be competent, as tending to show the understanding of the parties and the evidence here is that delivery within a year was not physically possible.) Such a performance must be an execution of the contract according to the understanding of the parties.

The court must look at the terms of the contract itself and see what Walker was bound to do, and what, according to the terms of the contract, it was the understanding of the parties he should do. Was it the understanding and intention of the parties that the contract might be performed within one year? If not, the contract was within the statute.

II.

It is said by counsel that the doctrine that a valid parol contract may not, *during its performance*, be modified in

some of its details by agreement of parties, finds no countenance in the decisions of the courts of Illinois.

Probably not, but what is the law as to agreements made *after breach* of a prior agreement? This Court in *Swain* v. *Seamens*, 9 Wallace, 271, Mr. Justice CLIFFORD delivering the opinion, states the rule thus: "It is held that the parties to an agreement, though it is in writing, may, *at any time before the breach of it*, by a *new* contract not in writing, modify, waive, dissolve, or annul the former agreement, if no part of it was within the statute of frauds. Reported cases may also be found where that rule is promulgated without any qualification; but the better opinion is, that a written contract falling within the statute of frauds, cannot be waived by any subsequent agreement of the parties, unless such new agreement is also in writing."

The part of the charge contained in the second error assigned (P. Rec., p. 63, Brief, p. 13), is erroneous, because the alleged agreement to deliver by rail, was made, if made at all, which we deny, *after Walker had been discharged from further performance*, and had stopped the delivery of stone. It was not a modification of the old agreement, but a new substituted parol agreement, made afterwards, similar to the old one, except in the particular of the mode of delivery.

No consideration for this new agreement was shown, nor is pretended, nor was there any element of estoppel, for there was no conduct on Walker's part to induce Johnson to rely on such alleged agreement. It is not enough that Walker, after the termination of the old contract, may have said that he would deliver, and that by rail. Johnson had no right to rely upon such a statement, there being no consideration for the alleged promise, and no action predicated upon its existence on the part of Walker.

The point is again presented under the third error as-

signed (P. Rec., p. 66, Brief p. 14.) The court charged, "If the testimony satisfy you that the defendant did, after the notice of the 12th of May, *recognize* the contract as still in force, and promise the plaintiff that he would go on and complete the same, the defendant cannot now claim as a defense that said notice released him from the performance of the contract."

There was not a particle of evidence that Walker "recognized the contract as still in force." There was evidence that he said he would deliver, but did not. There was no evidence of consideration. There was neither consideration nor conduct.

The court below assumed, and properly, that Walker was stopped by Johnson without just cause on the 12th of May. He desisted from further performance, and never resumed. It is now said that he agreed to resume. That is not enough. There is no consideration pretended for the agreement to waive the rescission and there was no recommencement of performance. The thing had ended and remained so. Is a bare promise to revive a dead transaction, effectual to give it life again?

Mutual promises, in order to be effectual as consideration, must be *real*. There was not only no *new* consideration promised by Johnson but no new promise to pay at all. He testifies (P. Rec., p. 51,) "Walker told me, 28th or 29th of May, that he had seen the railroad men, and they had agreed to transport the stone for $3 a yard, same as for Sawyer and Steele, and he would deliver by rail. I never had any other contract with Walker, fixing prices or anything of that character, except the written contract of Farwell, Lake and Walker. It is to that I refer in speaking of the contract. * * Walker said the 27th or 28th of May, he would deliver the stone at his contract price *by rail*."

Walker denies any such statement, and testifies (P. Rec., p. 54) that to deliver by rail at $3 would make the cost

from the quarry $6 per yard, leaving $1.45 for the stone, which was worth *at the quarry* between $4 and $5, while delivered by water the cost would be $3, and at $7.45, $4.45 would be received for the stone.

Johnson's contention, therefore, is that after the old agreement had come to an end, Walker agreed to resume it, not for any *new* consideration, but for *one-third* of the price he was to receive under the old contract. And there was no distinct promise to pay even this, except as it is involved in the assumed resumption of the old contract.

Nor is there any element of estoppel, because the alleged new contract was never executed, nor acted upon by the parties, and there was no fraud on Walker's part, nor anything tantamount thereto. He was guilty of no intent to deceive, and Johnson could not be deceived, for he knew the promise was without consideration.

Nor can the damage Johnson claims be sustained by the breach of this alleged second agreement form a legal consideration, for it did not exist at the time the alleged contract was made.

If this were otherwise, the same might be argued of every gratuitous promise, where an injury arises from a neglect to perform it.

Clearly, the Court erred in disregarding these well settled principles.

It is suggested that the verdict may be sustained, as for a breach of a second contract to deliver by rail, or a second contract with an option to deliver by boat or by rail, but this is arguing in a circle. There never was any such second contract possessed of legal validity.

III.

In relation to the alleged conversation with Walker, in June, 1870, by evidence of which it was sought, and manifestly with success, so far as the jury was concerned,

to prove that he then agreed to deliver, Walker positively denied, not the conversation, but the turn given to it by the plaintiff's witnesses.

He utterly denied any agreement, or any approach to an agreement, to renew the abandoned contract.

He was entitled, as he stood opposed to a greater or less extent, by the testimony of two of plaintiff's employees, to the caution requested in the instruction, which the Court refused, as stated in the fourth error assigned. (Brief, p. 15; P. Rec., p. 67). And in a case like that at bar, this error would seem amply sufficient to justify a reversal.

Respectfully submitted,

MELLVILLE W. FULLER,
For Plaintiff in Error.

Supreme Court of the United States.

No. 249.

EDWIN WALKER, PLAINTIFF IN ERROR,

vs.

WILLARD JOHNSON, DEFENDANT IN ERROR.

Points for Defendant in Error.

I. The court did not err in the refusal to charge or in the portion of the charge mentioned in the first assignment of error. (See plaintiff's brief, pp. 10 to 13; see Record, p. 62, for refusal, and Record, folios 112½ to 116 for charge.

1st. There was no error by the court in refusing to charge the *specific* proposition requested—(see same folio, 106—because—

(1st.) There is nothing in the Farwell, Lake & Walker contract referred to in the request from which it did appear or could be inferred that "it was not the intention and understanding of the parties that the same should be performed by the defendant" within a year from the making of the oral agreement. (See the Farwell, Lake & Walker contract, Record, folios 53 to 58.)

There is nothing in this contract which would authorize it to be submitted to the jury to find that the oral agreement was not to be performed within a year.

(2d.) But the Court below did instruct the jury on the subject referred to in the request quite as favorably to the

defendant as the law authorizes. (See charge, folios 113 and 114, commencing near top of page 65.)

The contract for the completion of the work, made with the State by Sherburn, Walker and Farwell required that they should complete the same "by the first day of June, 1871." (See clause as to this in Record, page 25.) They had a perfect right by its terms to get their stone and other material on the ground as soon as they pleased. Indeed, there is nothing in the terms of this contract that shows they had not the right to complete it during 1870. They were bound to commence it on or before August 1st, 1869. (See page 25, Record.)

2d. The portion of the charge referred to in the first assignment of error is not erroneous. (See same in plaintiff's brief, pp. 11 to 13, and in Record, folios 112½ to 116.)

The only exception taken to this is the general exception found at the top of page 66 of Record, folio 116.

There is nothing in the terms of either of the written contracts or the oral agreement between the parties to this suit which expressly or by implication, required more than a year for the performance of the agreement for the delivery of the stone.

It is true that the contractor with the State had till the 1st of June, 1871, to complete the Dam and Lock. He was bound to complete the same by that time. (See contract with the State, Record, p. 25.) But clearly he *might* complete it within a year from November 6th, 1869, and require the defendant to deliver the stone in time to enable him to do so.

Again to enable the contractor with the State to complete the work by 1st of June, 1871, he might reasonably insist that the stone should all be delivered during the season of and before Nov. 1st, 1870—the stone was to be delivered by canal and river—it could not on account of frost be de-

livered from November 1st till April. It was most advantageous to the contractor with the State to have the stone delivered so he could have them prepared and dressed during the winter. (Folios 65–66; folio 73.) Any prudent contractor who was bound to complete such a job by the 1st of June, 1871, would require the stone to be delivered to him by November, 1870. This would be in accordance with a fair and reasonable construction of the contract between the plaintiff and defendant. It appeared on the trial that the defendant below delivered about one-half of all the stone between August and November, 1869. There would have been no difficulty in his delivering the other half during the entire season of navigation in 1870.

3d. It is submitted that the instructions given by the court as to the application of the statute of frauds to the alleged contract between the parties were correct. (See Record, folios 111 to 116.)

The rule of law is that if the contract by its terms or by a reasonable and fair construction of all its provisions taken together, shows that it was not intended by the parties that it should be performed within a year, then it is within the statute, although it was physically possible to perform it within that time. This the court did charge. (Folio 113). Brown on Statute of Frauds, 3d Edition, secs. 273–283.)

But if by the terms of the contract, the subject matter, and the situation of the parties, it is shown that the contract could be, and reasonably *might* in its execution, be required to be performed within a year, it is not within the statute.

Brown on Statute of Frauds, §§ 274, 275.

Ib., §§ 278*a*, 279, 286, and cases cited under these sections.

The charge of the court below was in accordance with these rules of law. (Record, folios 114, 115.)

II. The second assignment of errors is that the court erred in the portion of the charge set out on page 13 of the brief for the plaintiff in error, and which is found commencing at the bottom of page 63 of the record, and ends with the exception near the top of page 64.

The exception is general. It in no manner indicated or suggested the ground of the exception.

But it is submitted that there is no just ground for complaint as to this portion of the instructions. The parties clearly had a right to modify the prior parole contract by agreeing that the stone should be delivered by rail instead of boats. Their mutual promises, the one to deliver and the other to accept the stone by rail, would be a sufficient consideration if a new one was essential.

If the court below is to be regarded as speaking of a new agreement between the parties, then their mutual promises are sufficient consideration.

III. The third assignment of error is in reference to the portion of the instructions of the court, set out on pages 13 and 14 of the brief of the plaintiff in error, and which is found in the Record, folios 117–118. The only exception taken, folio 119, seems to have been to all the instructions found on pages 66 and 67 preceding it.

The defendant insisted as a defense, that on or about the 12th of May, 1870, the plaintiff wrongfully terminated the contract and prevented the defendant from performing it. (See plea, folio 33 of Record.)

The evidence to sustain this was the telegram and letter set out at folios 67 and 68 of Record.

The plaintiff below gave testimony tending to prove that the stone which was being furnished from the quarry, the 12th of May, was defective and had been objected to by the State officers, and that defendant had been notified of this.

(See Test. of Wells, folios 66½ to 67: and of Jenne, folios 74 and 75.)

The plaintiff below gave further testimony tending to prove that this forbidding of a further delivery of stone from the quarry was waived and that it was agreed that the defendant should proceed to fulfill the contract. (Test. of Wells, folios 68–69: of Smith, folios 78–79: Hayes, folio 64: Johnson, 60½–61.)

The testimony proves that it was a mere afterthought on the part of the defendant to pretend that he failed to deliver because of the telegram and letter. He was constantly, during the last of May and during the summer, promising Johnson that he would fulfill the contract.

The court submitted the question to the jury to find on the evidence whether the stoppage of delivery, indicated by the telegram and letter, was waived by the parties; whether the parties, after the telegram and letter, recognized and mutually agreed that the contract was in force, and that it should be performed by the defendant: and that if they so found this defense was not made out. But if the defendant made no agreement after the 12th of May, recognizing the contract as in force, or promising to perform it or continue it in force, then this defense was made out. (Folio 117.)

It is submitted that the instructions were quite as favorable to the defendant as they should have been.

The mutual promises of the parties were a sufficient consideration to uphold the waiver. As an adjustment of the misunderstanding as to the temporary stoppage of the delivery of the stone, and as to the quality of the stone being delivered at that time, this agreement would be upheld.

IV. There was no error by the court in declining to instruct the jury in the language requested and set out in the fourth assignment of error, and found at folio 119 of the Record.

There was nothing peculiar in this case or the testimony

to render this instruction important. No material point in the case depended on testimony of confessions by either party. The contract was by parole; both the parties were sworn as witnesses, and the testimony as to what was said as given by the parties and other witnesses was somewhat conflicting. There is nothing in this case beyond most others where witnesses differ as to what was said requiring special instructions as to the law of evidence.

The court had in the charge said all that was necessary on the subject. (See Record, folio 109.)

It is respectfully submitted that the case was fully tried, and fairly submitted to the jury, whose verdict is clearly authorized by the evidence; that no material error was committed; and that the judgment should be affirmed.

FRANCIS KERNAN,
Of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1877.

EDWIN WALKER,
PLAINTIFF IN ERROR,
vs.
WILLARD JOHNSON,
DEFENDANT IN ERROR.

} Error to the Circuit Court of the United States, for the Northern District of Illinois.

Brief for Defendant in Error.

JNO. L. THOMPSON,
For Deft in Error.

CHICAGO
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IN THE

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WILLARD JOHNSON,
DEFENDANT IN ERROR.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

Brief for Defendant in Error.

MAY IT PLEASE YOUR HONORS:

In the summer of 1869, Farwell, Lake, and Walker had entered into a contract with the State of Illinois to build a lock and dam on the Illinois River at Henry. These three had entered into a tripartite contract, in which it was agreed that Farwell should have control of the finances: that Lake should have the general superintendence of the work, and that Walker should "furnish all the "stone required for the construction of said lock and dam, "to be by him delivered on board canal boats at Henry, "aforesaid, as the same may be required in the progress "of said work": and for which Walker was to receive a

stipulated price for the various qualities of stone which were needed.

Walker was the owner of a quarry at Lamont, in Illinois, on the Illinois and Michigan Canal. The mode of transportation was, to take the stone from the quarry at Lamont, on the canal, to LaSalle, a distance of about seventy-four miles, and then from LaSalle to Henry on the same boats, a distance of about twenty-six miles. There was also communication between Lamont and Henry by rail.

Farwell, Lake, and Walker entered upon the performance of their contract with the State in August, 1869, and by November, 1869, Walker had delivered at Henry a considerable quantity—nearly half of the stone required in the construction of the dam and lock. About the 6th of November, 1869, Willard Johnson, the defendant in error, purchased from Farwell, Lake, and Walker the right to complete this contract, and, as he alleges, at the same time entered into a verbal agreement with Walker to furnish the remainder of the stone at the same prices as agreed in the tripartite contract. The substitution of Johnson for Farwell, Lake, and Walker was agreed to by the representatives of the State, and the bond of Johnson was given in place of that of Farwell, Lake, and Walker. In the spring of 1870 Walker commenced the delivery of the stone, and continued until about the 12th of May in that year, when the delivery was stopped by the peremptory order of Johnson. The cause of the suspension was in dispute on the trial in the court below: Johnson's witnesses insisting that it was owing to the quality of stone which was being delivered by Walker; and, upon the other side, it was contended that the only reason for the suspension was the fact that the stone from the canal bank was not delivered, instead of from Walker's quarry, it being more economical for Johnson to use the stone from the canal bank, because they were relieved by the State contract from the

payment of canal tolls. After the suspension of the delivery of the stone in May, Johnson and Walker again came together, and a new arrangement was made by which, as Johnson alleges, Walker agreed to continue and complete his contract for the delivery of all stone required by rail, when the water in the canal was too low to deliver by boat. Walker denies that any such contract was made; but the jury found in favor of Johnson, and we are therefore justified in assuming that such contract was in fact made. Walker did not deliver the stone as required by Johnson, and Johnson was compelled to procure his stone elsewhere, and at a higher price than that stipulated between him and Walker, and this suit was brought to recover damages caused by the non-fulfillment of the contract by Walker. The jury found a verdict in favor of plaintiff, and assessed his damages at $6,500.

The declaration contains several counts, and declares upon the contract stated in four different ways: *First*, That Walker agreed to deliver the stone on board of canal boats at Henry. *Second*, That Walker agreed to deliver on board of canal boats at Henry, and that afterwards by mutual consent, and in consideration of the difficulty of delivering by boat, the contract was modified so that the delivery might be by rail. *Third*, That Walker agreed to deliver the stone by rail. *Fourth*, That Walker agreed to deliver the stone at Henry, without mentioning the mode of transportation. The defendant pleaded beside the general issue. *First*, that the contract was terminated by Johnson. *Second*, Plea at set off and recoupment, claiming damages for such termination. *Third*, The Statute of Frauds, that the contract was not to be performed within one year.

Walker, the plaintiff in error, objects to the verdict and judgment upon two principal grounds. *First*, The Statute of Frauds, and *second*, that it was incompetent to modify the contract from one requiring delivery by boat to one re-

quiring delivery by rail without a new consideration, which new consideration was not shown.

I.

The Statute of Frauds.

The contract with the State required that work upon the lock and dam should be commenced August 1st, 1869, and should be completed as early as June 1st, 1871, unless unavoidably prevented by high water in the Illinois River, in which case it should be completed on or before the 1st of September, 1871. The contention of the counsel for the plaintiff in error, is that inasmuch as the contract was by parol and made as early as November, 1869, a delivery of the stone contemplated by the contract, was to continue throughout the entire length of time allowed by the State for the completion of the work which reached until June 1871, more than one year from the time of making the contract. The court below did not take that view of the case, but held substantially that Johnson had the right under the contract as shown to call for the delivery of all the stone required during the year, and having that right the contract could not be considered one which was not to be performed within one year. The part of the charge relating to this question, is as follows:

"The fact that the dam and locks were not, by the contract with the State, to be completed before June or September, 1871, did not preclude the contractors from completing it at an earlier day if they saw fit, nor did it preclude them from calling upon defendant for this stone as fast as they wanted it for the purpose of pushing on the work.

"I find nothing in the contract with the State, nor in the contract between the defendant, Farwell & Lake, which prevented the contracting parties in the original contract from completing the contract at an earlier day than that limited in the said State contract.

"If the contract by its terms is not to be performed within a year, then of course there would be no doubt about the application of the statute. If it said in so many words that it is not to be performed within a term beyond a

year from the time of making the contract, it must obviously be considered within the provisions of the statute. If the contract from a fair construction of all the clauses and the provisions, when taken together, shows manifestly that it was not intended that it should be performed within a year, then the contract would be considered as within the statute; but you must explore only the contract itself. You can not go outside of the contract for the purpose of determining that question. The contract between these parties being a parol contract, however, you must take it, and all that the parties say about the contract, for the purpose of determining this question, and determining what they intended and meant by it

"Here, however, the aspect of the question presented to us is a written contract made between certain parties, and which it is claimed the defendant agreed with the plaintiff that he would perform, and the question is, when did he intend or agree to perform it? If the contract is such that either party may insist upon its performance within a year, and place the other in default if not performed, then the contract is not within the statute. This I lay down as a general rule, and as a fair test by which to determine the question of whether this contract was within the statute or not.

"If you find, from the evidence in this case, that while there was no specific time fixed by the terms of the contract, or fairly deducible from it for its performance, yet it was of such a nature that it might have been performed within a year; that is, if either party could have insisted upon its performance within a year, then the statute does not apply.

"It is not a question whether it is probable or improbable that all this stone would have been required by the plaintiff for the completion of this work within a year. That would involve a consideration of circumstances and contingencies with which we have nothing to do. But if the plaintiff had concluded to press his work with such vigor and rapidity as to require all the stone from the defendant during the year, had he a right under this contract to do so? That is a fair test. The contract of the defendant with Farwell and Lake binds the defendant to deliver the stone as the same may be required 'in the progress of said work.' So that the rapidity of the progress of the work is the measure of the rapidity with which the defendant is to deliver the stone; and if you are satisfied from the evidence that the defendant agreed with the plaintiff to deliver this stone in the same manner which he had agreed with Farwell and Lake to deliver them, and that such contract was one which might have been performed within a year at the plaintiff's option, then the said contract is not within the statute.

"The fact that the defendant had, within a few months after the contract with the State was made, delivered almost half of this stone, is of importance as tending to show that the work could have been fully performed by the defendant within a year from the time that the plaintiff and defendant made their contract, if you find that one was made."

We respectfully submit that the law is stated by the court as favorably for the plaintiff in error as he had a right to ask. He is, however, contented with nothing less than a positive direction by the court that the contract was within the statute and void. We do not think that the counsel for the plaintiff in error has succeeded in finding authorities for his view of the case. In the case cited from this court, *Packet Company* v. *Sickles*, 5 Wallace, 580, the contract provided, by its terms, that it should continue for twelve years with a provision for its earlier termination upon a certain contingency. And in the other case of *Boydell* v. *Drummond*, 11 East. 142, the court construed the contract to be one which, by its terms, was to continue for more than one year, and held distinctly that the Boydells did not have the right to call for the full performance of the contract within one year. It might be conceded that a contract which, by its terms, was not to be performed within a year, subject, however, to be performed within a year upon the happening of a certain contingency provided for in the contract, is within the statute. The authorities upon this point are not entirely harmonious. But the case of the *Packet Company* v. *Sickles* may be regarded as having settled the law upon that point in this court.

There is, however, a distinction to be noticed between the different kinds of contingencies by which the contract is terminated. If the contingency is one which tends to the performance or accomplishment of the contract in the sense originally contemplated by the parties, the statute does not apply. But if the contingency is one which effects the avoidance or termination of the contract without performing it, some authorities hold that the statute avoids the contract.

See note to *Dobson* v. *Collis*, 1 Hurls & Norman, 81, and cases cited.

The latter is the kind of contingency in question in *Packet Co.* v. *Sickles*.

The Supreme Court of Illinois, the State in which this contract was made, and in which it was to be performed, holds that a contract to support and maintain a child of sixteen until she reaches the age of twenty-one, is not within the statute, by reason of the possibility of the termination of the contract by the death of the child.

White v. *Murtland*, 71 Ill., 250.

The contract in the case at bar was, as shown in the brief for the plaintiff in error, subject to suspension at any time by the State officers, and the decision of the highest court of Illinois might be deemed decisive of this question upon that ground alone.

But there is no necessity of resting upon any contingency tending to the avoidance or termination of this contract. The contingency, if any, tended to the performance of the contract. It was not provided or agreed that it was not to be performed within one year. It was to be performed within the time to be determined by Johnson, and not within the time prescribed by the contract with the State for the completion of the work, and the Court might have told the jury that the contract was not within the statute. But the court, in fact, left the question to be decided by the jury, as to whether it was not also contemplated and intended by the parties that this contract should not be performed within a year. His language is: "If the contract, from a fair construction of all the clauses and provisions, when taken together, shows manifestly that it was not intended that it should be performed within a year, then the contract would be considered as within the statute." This is stating the position of the plaintiff in error as strongly as it was possible to find authority to support it. The jury found that the contract did not show that it was not to be performed within a year, and the evidence upon that point fully sustained the finding of the jury. Jenne, the engineer in charge, upon behalf of the

State, testifies that in the ordinary course of things, the stone should have been delivered during the season of 1870. It appears that substantially all the loose stone was delivered before Johnson entered upon the contract at all. There only remained the face stone and the stone for vertical walls. Jenne says: "The face stone should have "been furnished within the time from the commencement "of the work down to September, October, or the fall of "1870. The face stone should have been al' delivered dur- "ing 1870, and a portion of the backing. A portion of the "backing could have been delivered down to July, 1871." But the backing had been substantially delivered in 1869. Jenne's statement was made on the theory that the contractors proposed to occupy the entire time allowed by the State for the completion of the contract. If there had been a disposition on his part to hasten the work, it seems reasonable that all the stone should have been delivered in the fall of 1870. The testimony of Johnson and his foreman is to the same effect, that the stone should all have been delivered in the season of 1870, and they give as a reason, that the work required to be completed in the early part of the season of 1871, and the preparation of the stone being more economical in winter than in summer, they should have had the stone upon the ground in the fall of 1870, that it might be prepared so to be laid in the work in the beginning of the season following. We do not recollect any testimony offered on the part of plaintiffs in error containing a substantial contradiction of this theory.

"If the agreement may consistently with its terms be "entirely performed within a year, although it could not "be probable, or expected that it will be performed with- "in that time, it is not within the contemplation of the "statute."

Kent v. *Kent*, 62 N. Y., 564.

The case shows that this contract might have been completed within the year.

The test stated by the court to be applied by the jury in the decision of this point seems exceedingly reasonable, and is certainly not in conflict with any of the cases cited by counsel for plaintiff in error. "If the contract is such "that either party may insist upon its performance within "a year, and place either in default if not performed, then "the contract is not within the statute." I have found no case, and certainly none has been cited, which is inconsistent with this rule. In the Boydell case, the court expressly found that the Boydells could not put either party in default by requiring the performance of the contract within a year. And that class of cases which hold that a contract not to be performed within a year, except upon some contingency possible to happen, do not at all conflict with this rule. The contract is to be considered as of the time of making it. And we may concede that the expectation and contemplation of the parties are to be considered in construction of the contract. When Walker made this contract with Johnson, if he entertained any expectation in reference to the time of performance, it must have been that he was depending upon the action of Johnson for the time of its completion. And he must have known and expected at that time that Johnson could put him in default by requiring the performance of the contract within a year. In the Packet Company case, the parties making that contract must have known that it would not be possible, except in the contingency that either could be placed in default by requiring full performance of the contract within a year.

The authorities sustaining these propositions are numerous, and substantially uniform. The first two cited are precisely in point, and remarkably similar to the case at bar.

Morley v. *Noblett*, 42 Ind., 85.

Larimer v. *Kelly*, (second case,) 10 Kansas, 298.
Gault v. *Brown*, 48 N. H., 183.
Peters v. *Westboro*, 19 Pick., 365.
Blake v. *Cole*, 22 Pick., 99.
Somerley v. *Buntin*, 118 Mass., 286.
Blair v. *Walker*, 39 Iowa, 410.
Greene v. *Harris*, 9 R. I., 401.
Hodges v. *Richmond*, 9 R. I., 487.
Souch v. *Strazebridge*, 2 Com. Bench, 811, where the application of the Boydell case is limited as above suggested.
Plimpton v. *Curtis*, 15 Wend., 336.
Browne on Stat. Frauds, Sec. 281.
1 Smith's Leading Cases, 432, star paging, (*Peter* v. *Compton*,) where many authorities are collected, and the principle fully illustrated.

II.

The plaintiff in error objects that the court instructed the jury to the effect that if there was a waiver of the suspension, or a modification of the contract as to the mode of transportation without a *new* consideration, the new or modified contract would be binding upon the parties, and he asserts the rule to be that a verbal agreement to be effectual as a waiver or modification of a contract must arise upon some new and distinct legal consideration. It might be, and probably is, a sufficient answer to this objection to say that the plaintiff in his pleadings declares upon a contract to deliver by rail, which contract was made in June, 1870, and the jury might well have considered that the first contract, to deliver by boat, having been

fully performed or abandoned, was not to be taken into consideration, and that there had been a breach of the second contract to deliver by rail. The verdict can also be sustained on another theory, for the pleadings and the evidence justify the finding for the plaintiff, upon the ground of a breach of a contract to deliver all the stone required in the progress of the work, at a certain stipulated price, in which Walker had the option of delivering by boat or by rail. Upon either of these two theories, both of which find ample justification in the record, the point taken as to the modification of the contract would, if sound, be of no avail. But the point is not well taken. That a verbal contract providing for the delivery of an article by a certain mode, cannot be changed by agreement of parties, and another mode of delivery substituted without any new legal consideration other than the consideration always implied in such contracts, is a proposition for which it will be difficult to find support. It is probably safe to say that not one building in a hundred is erected under contract between the owner and builder, in which some change or modification of the original contract is not made, and we never heard the theory advanced that it was not competent for the owner and the builder to make some change in the specification or plan of the building during the progress of the erection, without some special consideration.

If the first contract is within the statute of frauds, it may well be that a subsequent modification of the contract would not have the effect to take it out of the statute. But that a valid parol contract may not, during its performance, be modified in some of its details by agreement of parties, is a doctrine which finds no countenance in the decisions of the courts of Illinois.

The point is expressly decided against the theory of the plaintiff in error in the following cases :

Lane v. *Forbes*, 18 Ill., 568.
Cooke v. *Murphy*, 70 Ill., 96.
Bishop v. *Busse*, 69 Ill., 403.
Carrier v. *Dilzworth*, 59 Penn. St., 406.
Hill v. *Smith*, 34 Vermont, 535.
Monroe v. *Perkins*, 9 Pick., 298.

The same doctrine appears to have been recognized in this Court in *Mason* v. *United States*, 17 Wall., 67.

The principle of estoppel which is conceded to have the effect to make good a modification of a contract without a new consideration, has abundant ground for its application in this case. Wells, the foreman of Johnson, when asked why he waited so long in the summer of 1870 for Walker's stone, instead of procuring them elsewhere, replied that they " were living upon Walker's promises." (Rec., page 47.) Smith says that he heard a conversation between Walker and Johnson, in which Johnson spoke of procuring stone from Sanger & Steele, when Walker replied : " I " don't want you to do that. I will get the stone myself, " according to the old contract." And in the same conversation Walker said: " I'll furnish the stone—send your cut- " ters on." (Rec., page 51.) And the case shows that *the cutters were sent*. (See Hayes' testimony, Rec., page 45.)

The other objections are rather criticisms of the phraseology of the charge of the Court than substantial questions of law. The counsel for Walker adroitly attempted to turn the entire case upon the suspension of the first arrangement, and proved, or attempted to prove, large damages against Johnson, on the ground of the termination of that arrangement, by the telegram of May 12th, 1870. The attempt was not successful, and we understand that the claim for damages is now abandoned. The jury were

twice distinctly told by the Court that if the contract was terminated by Johnson, and that termination was not waived, and no new contract made, the defense was made out, which was all the defendant had a right to ask. The Court was compelled to dispose of the question of recoupment, because a large portion of the time of trial had been occupied upon that counter attack of Walker. A fair and reasonable construction of the entire charge, in view of the circumstances attending the trial of the case, seems to afford no ground for criticism.

The refusal of the instruction as to verbal admissions is justified when the first part of the charge is read, and it is remembered that nearly all the testimony on both sides was verbal.

Respectfully submitted.

JNO. L. THOMPSON.

For Def't in Error.